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No. _____

Supreme Court, U.S.
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In the

Supreme Court of the United States

October Term, 1993

THOMAS G. LOVETT, JR.,
Trustee of the Bankruptcy Estate of
JOHN PETERSON MOTORS, INC.,

Petitioner,

v.

GENERAL MOTORS CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, under the Seventh Amendment to the United States Constitution, which provides that "no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of the common law," the Court of Appeals may reverse a jury finding of the existence of a conspiracy in violation of Section 1 of the Sherman Act on the ground that the evidence supporting the verdict is "highly ambiguous?"

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No.

IN THE
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OCTOBER TERM

**Thomas G. Lovett, Jr.,
Trustee of the Bankruptcy
Estate of John Peterson
Motors, Inc.,**

Petitioner,

vs.

General Motors Corporation,

Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

Thomas G. Lovett, Jr., Trustee of the Bankruptcy Estate of John Peterson Motors Inc., the Petitioner herein, prays that a writ of certiorari issue to review the judgment of the United

States Circuit Court of Appeals for the Eighth Circuit entered in the above-entitled case on July 9, 1993.[1]

OPINIONS BELOW

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit which is the object of this petition is reported in Lovett v. General Motors Corporation, 998 F. 2d 575 (8th Cir. 1993). A copy of that opinion as amended is printed in Appendix A, infra p. A-1. The judgment of the United States District Court for the District of Minnesota (the Trial Court) is printed in Appendix A, infra p. A-12. The Order of the Trial Court denying defendant GM's alternative motions for judgment n.o.v. or for a new trial is reported in Lovett v. General Motors Corporation, 769 F. Supp. 1506 (D. Minn. 1991). A copy of that opinion is printed in Appendix A, infra p. A-14.

JURISDICTION

The decision of the United States Court of Appeals for the Eighth Circuit is dated July 9, 1993. A timely petition for rehearing and suggestions for hearing en banc were filed. On September 3, 1993, the Court's Opinion of July 9, 1993 was amended by Order of the Court of Appeals. Appendix A, infra p. A-12. The petition for rehearing was denied on

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[1] Donald John Peterson was a party to proceedings in the Circuit Court of Appeals for the Eighth Circuit. Mr. Peterson's individual claims were resolved in a separate opinion reported in Lovett v. General Motors Corporation, 975 F. 2d 518 (8th Cir. 1992). He is not a party to this petition. All other parties to proceedings in the Circuit Court appear in the caption.

September 9, 1993. Appendix A, infra p. A-47. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In suits at common law, where the value in controversy shall exceed $20, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of the common law, U.S. Const. Amend. VII.

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with the foreign nations is declared to be illegal: ... 15 U.S.C. § 1.

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained and the cost of suit, including a reasonable attorneys fee. 15 U.S.C. § 15.

STATEMENT OF CASE

A. FACTS WITH WHICH THERE IS NO DISPUTE.

In late 1980, John Peterson Motors, Inc. (hereinafter "JPMI") opened an automobile dealership in Lake City, Minnesota, pursuant to written Dealer Sales and Service Agreements (DSSA's) with each GM Division. JPMI was authorized to sell Cadillac, Buick, Oldsmobile, Pontiac and Chevrolet motor vehicles.[2] GM had no policy with respect to minimum vehicle prices. In fact, pursuant to the terms of the DSSA's, JPMI was free to sell cars at any price, to any customer, no matter where located.[3]

In 1980, 1981 and 1982, JPMI operated as a "traditional dealer." During those years, JPMI lost money.[4] In February, 1983, JPMI initiated the "$49 over" marketing program. Pursuant to that program, JPMI marketed and sold vehicles to retail customers at $49 over dealer invoice price.[5]

After JPMI began the "$49 over" program, other dealers in the Twin City metropolitan area complained to GM about JPMI's competitive pricing program.[6] Jack Walser, a metropolitan area Buick dealer, told GM that the JPMI "$49 over" program had been discussed at Buick Dealer Advertising Association meetings.[7]

Not long after this contact, GM held a series of conference calls among GM marketing staff, divisional

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[2] Brief for Appellant at 4, Lovett v. General Motors Corporation, 998 F. 2d 575 (8th Cir. 1993) (No. 91-2647MN).

[3] Id. at 2, n. 2.

[4] Id. at 3-4.

[5] Id. at 4.

[6] Id. at 6.

[7] Id.

personnel and lawyers to determine what to do about the "$49 over" program.[8]

Throughout 1983, JPMI continued to promote sales at "$49 over" dealer invoice. JPMI sales increased dramatically in 1983.[9] The Buick Motor Division of GM continued to fill orders placed by JPMI, and told JPMI's president, Donald John Peterson, that it would continue to do so.[10]

Complaints from other dealers about the JPMI "$49 over" program continued into 1984. In early 1984, GM again convened a meeting of marketing, sales and legal executives to determine what action to take, if any, with respect to the "$49 over" program. In March, Jack Walser again contacted the Buick Division Zone Manager and advised that "$49 over" programs were impairing his profit margins by $200 - $300 per car.[11] In the same period, GM reduced the allocation of vehicles to JPMI to "something in line with planning potential."[12]

In this time period, Keith Johnson placed an order with JPMI for a new Buick. When the car had not arrived in eight or nine weeks, he contacted other metropolitan area dealers and was told he could have delivery in 6 to 8 weeks if he was willing to pay sticker price for the car.[13]

B. PROCEEDINGS AND DISPOSITION BELOW.

Although its allocation of vehicles was severely reduced, JPMI remained in business throughout 1984, but filed for

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[8] Id.
[9] Id. at 4.
[10] Id. at 6.
[11] Id. at 8.
[12] Id. at 7.
[13] Id. at 9.

bankruptcy protection under Chapter 11 in 1985.

Before the bankruptcy proceeding was converted to a Chapter 7 proceeding, Donald John Peterson and JPMI[14] commenced this action seeking damages from General Motors under Section 1 of the Sherman Act, 15 U.S.C. § 1 and on other state and federal grounds. After the completion of substantially all discovery, but prior to trial, defendants brought a motion for summary judgment. That motion was granted in part, but was denied with respect to plaintiff's antitrust claims. Trial commenced October 15, 1990. Defendant's motions during trial for judgment as a matter of law or for directed verdict were denied. GM's defense of the case was founded upon the premise that actions taken by it in substantially reducing JPMI's allocation of cars were actions taken independently of dealer complaints. The case was submitted to the jury after further motions to dismiss were denied by the Trial Court. The jury returned a special verdict finding that General Motors dealers conspired to induce General Motors Corporation to reduce the allocation of automobiles to JPMI in an attempt to substantially restrain price competition. It further found that GM knowingly joined and became a member of that conspiracy, and that the conspiracy directly caused antitrust damage to JPMI in the amount of $986,000.[15] The district court entered judgment in favor of JPMI in the amount of $2,958,000.00 representing the amount of the verdict trebled pursuant to 15 U.S.C. § 15.[16]

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[14] JPMI is now represented by its Trustee in Bankruptcy, Thomas G. Lovett, Jr. The case is first reported sub. nom. John Peterson Motors, Inc. v. General Motors Corporation, 613 F.Supp. 887 (D. Minn. 1985).

[15] The Special Verdict is reproduced in the Appendix, infra p. A-48.

[16] The Judgment of the District Court is reproduced in the Appendix, infra p. A-12.

After the verdict, defendant moved, pursuant to Rules 50 and 59, F.R.Civ.P., for judgment notwithstanding the verdict or in the alternative for a new trial. The Trial Court, denied the motion with respect to JPMI's claims and made a finding that there was ample evidence upon which a reasonable jury could find the existence of a dealers' conspiracy and that General Motors had knowingly joined that conspiracy.[17] Lovett, 769 F. Supp. at 1522.

General Motors appealed. A three-judge panel of the United States Court of Appeals for the Eighth Circuit overturned the jury's verdict and the Trial Court's findings and ruled that the evidence submitted to the jury was "highly ambiguous" with respect to whether the drastic reduction of the allocation of vehicles to JPMI was permissible as unilateral conduct on the part of GM.[18]

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[17] The Trial Court granted GM's motion for judgment against Donald John Peterson, and the verdict in his favor was vacated and judgment of dismissal of his individual claim was entered. Lovett, 769 F.Supp. at 1508, n. 4, aff'd 975 F.2d 518 (8th Cir. 1992).

[18] After petitioner's filed the Petition for Rehearing En Banc, the Circuit Court amended its decision of July 9, 1993. Along with correction of certain typographical errors, the Court amended the penultimate of paragraph of the decision to include a reference to Section 1 of the Sherman Act and to insert the word "highly" to modify the description of the ambiguous evidence which it found to have been submitted.

REASONS FOR GRANTING WRIT

A. THERE IS A CONFLICT IN THE CIRCUIT COURTS IN APPLYING THE HEIGHTENED EVIDENTIARY STANDARDS ESTABLISHED FOR DEALER CLAIMS AGAINST MANUFACTURERS UNDER THE SHERMAN ACT.

In reaching its decision in this case, the Circuit Court reviewed the evidence, and attempted to apply the law established in Monsanto v. Spray-Rite Service Corporation, 465 U.S. 752, reh. den. 466 U.S. 994 (1984). The Court determined that Monsanto stands for the proposition that, "[b]ecause a fine line separates unlawful concerted action from legitimate business practices, an antitrust conspiracy cannot be inferred from 'highly ambiguous evidence'. Monsanto, 465 U.S. at 763." Lovett, 998 F.2d at 578. Citing Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corporation, 475 U.S. 574 (1985),[19] for the proposition that an inference of a conspiracy must be "reasonable in light of competing inferences of independent action, the Court went on to determine that Lovett's evidence was "highly ambiguous" and that it did not, therefore, support the judgment. Lovett, 998 F.2d at 581.

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[19] This case is inapposite since it is a summary judgment case and since it deals with plaintiff's attempts to prove the violation of Section 1 of the Sherman Act through evidence of predatory, price-cutting activities. As the Supreme Court has recently observed, price-cutting activities are fundamentally different than conduct directed to higher service prices and market foreclosure. The latter is "facially anticompetitive and exactly the harm that the antitrust laws aim to prevent." Eastman Kodak Company v. Image Technical Services, Inc., 112 S.Ct. 2072 (1993).

One problem with the Court's decision is that Monsanto does not hold that ambiguous evidence cannot support a finding of conspiracy. To the contrary, that case stands for the proposition that even ambiguous evidence can be the basis for a finding of conspiracy, as long as it, ..." tends to exclude the possibility that the manufacturer and the non-terminated distributor were acting independently." Monsanto, 465 U.S. at 764.

A second problem with the decision is that it is apparent that the Circuit Court did not adopt the two-step analysis favored in other circuits. Under the two-step test, the appellate court must determine (1) whether plaintiff's evidence is "ambiguous"; that is whether the evidence is as consistent with permissible independent action as with illegal conspiracy and, (2) if it is ambiguous, whether there is any evidence which tends to exclude the possibility that defendants were acting in their own independent interests. If there is any evidence which tends to exclude the possibility of independent action, however ambiguous, there is a genuine issue of fact for the jury. Gibson v. Greater Park City Company, 518 F.2d 722, 724-25 (10th Cir. 1987), Key Financial Planning Corporation v. ITT Life Insurance Company, 828 F.2d 635 (10th Cir. 1987), Reserve Supply Corporation v. Owens Corning Fiberglass Corporation, 791 F.2d 37, 49 (7th Cir. 1992). The two-step procedure is compatible with the requirements of the Seventh Amendment to the Constitution, whereas the one-step analysis utilized by the Circuit Court in this case is not.

B. THE DECISION IN THIS CASE IS IN CONFLICT WITH PROVISIONS OF THE SEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

In the Monsanto case, the Court concluded that there was danger in permitting inferences to be drawn from "highly ambiguous" evidence, and that, therefore, an anticompetitive agreement could not "be inferred merely from the existence of complaints, or even from the fact that termination [of the dealer] came about 'in response to' complaints..." because such an inference could "deter or penalize perfectly legitimate conduct." Monsanto, 465 U.S. at 763. Therefore, "...something more than evidence of complaints is needed. There must be evidence that tends to exclude the possibility that the manufacturer and non-terminated distributors were acting independently." Id. p. 764. Evidence of dealer complaints coupled with "arguably more ambiguous" evidence in a distributor's news letter of Monsanto's efforts to maintain a minimum market price was held to be sufficient to sustain the jury verdict in that case. Under that standard, there was a jury issue as to the existence of a price-fixing conspiracy involving the manufacturer and its distributors. Id. at 768.

In this case, there was evidence tending to exclude the possibility of independent action. As GM freely admits, policy meetings of GM executives were commenced only after the dealers complained about the JPMI "$49 over" sales program. Prior to the dealer complaints, GM did not have a policy with respect to minimum dealer price. In fact, GM asserted at trial that GM dealers were free to sell to anyone, anywhere, at any price. See source noted, supra, note 2.

The Trial Court concluded that there was sufficient evidence to support the conclusion by a reasonable jury that

GM's actions were not coincidentally independent when it took steps to drastically reduce the allocation of vehicles to JPMI in 1984.

The Trial Court cited examples of evidence which tended to exclude the possibility that GM acted independently of the dealer conspiracy. For example, evidence introduced at trial showed that the dealer complaints caused the Buick Division to relieve its District Manager, Doug Thompson, of his regularly assigned duty to allocate cars to JPMI. Lovett, 769 F. Supp. at 1511. The Oldsmobile zone manager became so angry at John Peterson over the "$49 over" program that he threatened legal action and then stormed out slamming the door and breaking the wall at the dealership. Id.

The Cadillac zone manager told John Peterson that the metro Cadillac dealers could "buy the entire town of Lake City." Peterson testified that he wasn't sure if Grogg was speaking for GM or the Cadillac dealers association. Id.

The Chevrolet division representative at the February 1984 GM meeting on the subject of the JPMI "$49 over" problem testified that the purpose of the meeting was to make sure that all of the five GM Divisions "were singing from the same hymnal." Id.

There is evidence that GM lied to JPMI customers. One customer, Keith Johnson, ordered a Buick from JPMI. When it hadn't been delivered after nine weeks, he called GM direct. Jean McGowan, a GM headquarters employee, told him that JPMI had not "preferenced"[20] the car. In fact, JPMI had preferenced the car, and when confronted with this fact, Ms. McGowan said, "you know what is happening." Meanwhile, Johnson had contacted Buerkle Buick and Stephens Buick,

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[20] "Preferencing a car" means that a customer's order for a specific vehicle with the specific equipment and options required by the customer is placed on the schedule to be built at the factory.

whose representatives told him that the model he wanted could be delivered in 4 to 6 weeks if he was willing to pay at or near "sticker" price. Id. at 1511-1512.

Another JPMI customer, J. Brooks, was also told by metro area dealers that he, too, could have the model Buick he wanted if he would pay "sticker price." Brooks testified that he was told that Twin Cities dealers had convinced GM to "run JPMI out of business." Id. at 1512

GM was not truthful about the allocation of vehicles to JPMI. In the Fall of 1983, James Pirtle, the Buick Zone Manager, told Donald John Peterson that the zone operated on a "turnover" distribution system.[21] To solve the "$49 over" problem, however, the evidence shows that GM reduced JPMI allocations to something "in line with planning potential" which was a factor never before used by GM to allocate cars. Id. In a telephone conversation with Donald John Peterson on February 8, 1984, Pirtle told him that Buick would continue to preference cars that JPMI ordered, but a memo from William Sanger at division headquarters indicates that the decision had already been made to reduce allocations to something "in line" with planning potential which drastically reduced the number of cars that JPM could receive. Id.

When it finally told JPMI that it was going to reduce its vehicle allocations in March, the reason given was that there was a shortage of vehicles for delivery to the dealers. In fact, there was at least a 50 day supply on hand. Pirtle conceded a 58 day supply. Other GM executives testified that a 30 day supply would have been sufficient to meet dealer needs in the zone. Despite excess inventory, GM continued to refuse to allocate cars or even to tell JPMI how many vehicles would be

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[21] The "turnover distribution system" was GM's established policy for allocating cars to dealers. Pursuant to that system, a dealer earned the allocation of one vehicle for each vehicle he sold.

preferenced and how many it could expect to receive. Id. at 1513.

The decision of the Circuit Court of Appeals clearly violates the mandate of the Seventh Amendment to the United States Constitution. The right to have a jury of one's peers determine the facts from the evidence at trial is one of the most sacred principles of American justice. The Seventh Amendment provides:

> In suits at common law, where the value in controversy shall exceed $20, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

U.S. Const., Amendment VII.

The right to trial by jury applies to treble damage suits brought under the antitrust laws of the United States and is an essential part of the of the Congressional plan for enforcing the antitrust laws and promoting competition. Beacon Theaters, Inc. v. Westover, 359 U.S. 500 (1959). The mandate of the Seventh Amendment means that a court of appeals may not weigh the evidence again, but that it is limited to an examination of the record, and to a determination of whether there are any facts which support the jury's conclusion.

> Only when there is a complete absence of probative facts to support the conclusion reached [by the jury] does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are

> inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable.

Levander v. Kurn, 327 U.S. 645 (1946). The Supreme Court has repeatedly held that the appellate court view of the facts cannot be substituted for the judgment of the jury. "[N]either we not the Court of Appeals can redetermine facts found by the jury any more than the District Court can predetermine them. Atlantic and Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 396 U.S. 355, 358-359 (1962).

As the Seventh Circuit has observed, the "[c]redibility of witnesses and weight of the evidence are matters within the purview of the jury, especially in a case such as this which turns, in large measure, upon the defendants' motive in making certain decisions." Knapp v. Whitaker, 757 F.2d 827, 843 (7th Cir. 1985). This case, too, turns on the motive in making certain decisions; principally GM's decision to stop allocating cars to JPMI even though it had no established minimum price policy, and despite the fact that it had nearly twice the number of Buicks necessary to meet demand in the zone. GM advances the notion that the decision to drastically cut back on JPMI allocations was a business decision arrived at independently of the complaints of dealers and dealer associations in the Minneapolis zone. But the Trial Court found that the jury could legitimately conclude, based upon the apparent lack of credibility of the GM employees called to testify at trial, that GM's action was not unilateral but was taken in concert with the complaining dealers.

> Under the Monsanto standard, the plaintiff's introduced sufficient additional evidence to support a finding that GM acted in furtherance of the dealers' conspiracy. The jury was entitled to evaluate the credibility of the witnesses and draw inferences regarding their motives and actions. Although GM presented evidence that it acted for legitimate business reasons, plaintiffs presented evidence that GM acted with an unlawful purpose and knowingly joined the dealers' conspiracy, and the jury chose to believe the plaintiff's evidence regarding GM motives. Viewed as a whole, there was sufficient evidence to establish that GM joined the conspiracy and that the jury so concluded. Therefore, GM's motion for judgment nov or a new trial based on insufficient evidence is denied.

Lovett, 769 F. Supp. at 1513.

When there is conflicting testimony concerning a question of fact, a jury's decision to believe one witness and not to believe another, and thus to decide a particular question in a particular way, is conclusive. "The choice of conflicting versions of the way the accident happened, the decision as to which witness was telling the truth... are questions for the jury." Ellis v. Union Pacific Railroad Company, 329 U.S. 649, 653 (1947).[22]

Even where the testimony is uncontradicted, a jury may

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[22] cf. Anderson v. City of Bessemer, 470 U.S. 564, 575 (1985) which holds that for non-constitutional reasons the findings of a trial judge based upon his decision to credit the testimony of one of two witnesses each of whom had advanced plausible versions of the facts are not clear error if not internally inconsistent in the absence of contradictory extrinsic evidence.

have regarded the testimony as deliberate misrepresentation. The bearing of the witness on the stand might convince a jury that:

> ...not only that the witness' testimony is not true, but that the truth is the opposite of his story; for the denial of one, who has a motive to deny, may be uttered with such hesitation, discomfort, arrogance or defiance, as to give assurance that he is fabricating, and that, if he is, there is no alternative but to assume the truth of what he denies.

Dyer v. MacDougal, 201 F.2d 265, 269 (2d Cir. 1952). Thus, in a case where each witness was alleged to have had actual knowledge of a fraudulent scheme to defraud certain third parties at the time a deed was delivered, the jury was allowed to determine whether the witnesses had knowledge of the scheme despite the fact that each witness denied actual knowledge or cause to suspect the fraudulent intent. Sonnentheil v. Christian Moerlein Brewing Co., 172 U.S. 401 (1899).

In reaching its decision in this case, the panel of the Court of Appeals substituted its own view of the evidence for that of the jury and ignored the findings of the Trial Court which, after exhaustive briefing and arguments, refused to dismiss plaintiff's claims holding there was ample evidence to sustain the verdict.[23] The Appellate Court, however, concluded, "In

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[23] Early in the case the trial court refused to dismiss plaintiff's antitrust claims. John Peterson Motors, 613 F.Supp. 887. Following the close of discovery, the trial court again refused to grant defendants motion for summary judgment. Order of September 18, 1989. At the close of plaintiff's case, the trial court denied defendant's motion for judgment. And the trial court refused to grant defendant's motion for judgment n. o. v. or for a new trial on the grounds that a reasonable jury

our view, Lovett's evidence is ambiguous." Lovett, 998 F.2d. at 580. "We agree with GM that the evidence is as consistent with GM taking independent action to preserve its distribution system as with conspiracy." (Emphasis added.) Id. It is on this impermissive new finding of fact that the Appellate Court reaches the conclusion that, "[b]ecause the evidence is as consistent with permissible unilateral conduct as with conspiracy, the evidence is insufficient to support the alleged antitrust conspiracy." Id. at 581. These impermissive new findings and conclusions are radically different from those of the Trial Court and jury, each of whom had the full opportunity during the twenty days of trial, not only to hear the testimony of witnesses and to review the documents, but to observe the demeanor of each of the witnesses on the stand.

The jury found that the metropolitan dealers did conspire to substantially restrain price competition, and that GM had joined that conspiracy. Special Verdict, Appendix A, infra p. A-54. Since the existence of a conspiracy is seldom capable of proof by direct evidence, it may be inferred from the actions taken. Eastern States Retail Lumber Dealers Association v. United States, 234 U.S. 600, 612 (1914). The character of conspiracies are to be determined by analysis of the activities of the participants as a whole.

> ...[P]laintiffs should be given the full benefit of their proof without tightly compartmentalizing various factual components and wiping the slate clean after scrutiny of each. "...[T]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts but only by looking at its whole. United States v. Patten, 226 U.S. 525,

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could conclude that G M joined the dealer conspiracy to fix the price of new GM vehicles. Lovett, 769 F.Supp. 1506.

> 544...; and in a case like the one before us, the duty of the jury was to look at the whole picture and not merely the individual figures in it." American Tobacco Co. v. United States, 147 F.2d 93, 106 (CA 6th Cir.)...

Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699 (1962).

The Judges of Court of Appeals could read what was contained in the cold record, but they could not apply their common sense observations to judge the credibility of the witnesses giving the allegedly "ambiguous" evidence. Indeed, they did not have the opportunity to draw the conclusion from observing the witness that the motivation for GM to drastically reduce the allocation of cars to JPMI was, in truth, in furtherance of the conspiracy of dealers in the zone to maintain their non-competitive price margins.

> The jury were the judges of the credibility of the witnesses... and in weighing their testimony had the right to determine how much dependence was to be placed upon it. There are many things sometimes in the conduct of a witness upon the stand, and sometimes in the mode in which his answers are drawn from him through questioning of counsel, by which a jury are to be guided in determining the weight and credibility of his testimony. That part of every case...belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men: and so long as we have jury trials they should not be disturbed in their possession of it, except in a case of manifest and extreme abuse of their function.

Aetna Life Insurance Co. v. Ward, 140 U.S. 76, 88 (1891). That the Court of Appeals reached an impermissive conclusion on the same evidence submitted to the jury and heard by the Trial Court is attributable to the fact that the Appellate Court could not and did not view the evidence "as a whole."

What is beyond dispute in this case is that the Twin City metropolitan dealers and other dealers combined to urge GM to solve the "$49 over" problem in an effort to restore the higher price margins and that GM acted accordingly. That the Court of Appeals chose to "agree with GM" in spite of the admitted fact that GM had never had, or attempted to enforce, a minimum pricing policy until after it received complaints about the JPMI "$49 over program" and in spite of additional evidence which shows that GM officials concealed its newly adopted policy, lied to Donald John Peterson about the supply and availability of automobiles, is testimony, not to the lack of evidence of GM's conscious joinder in the conspiracy, but merely to the Appellate Court's independent view of the disembodied testimony and evidence in this case.

CONCLUSION

Because the decision of the Circuit Court misapplies the principles established in Monsanto; because it does not give due regard for the evidence presented at trial; and because the decision, if allowed to stand, will jeopardize the constitutionally protected right to trial by jury, the Court should grant the Petition herein requested.

Dated this 8th day of December, 1993.

Respectfully submitted,

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Judgment of the District Court A-12

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United States Court of Appeals
For The Eighth Circuit

No. 91-2674MN

Thomas G. Lovett, Trustee of The Bankruptcy Estate of John Peterson Motors, Inc.; Donald John Peterson, individually, Appellees, v. General Motors Corporation, Appellant.	* * * * * * * * * * *	Appeal from the United States District Court for the District of Minnesota.

Submitted: May 15, 1992

Filed: July 9, 1993

Before FAGG, Circuit Judge, HENLEY, Senior Circuit Judge, and HANSEN, Circuit Judge.

FAGG, Circuit Judge.

Thomas G. Lovett, trustee of the bankruptcy estate of John Peterson Motors, Inc. (JPMI), and Donald John Peterson, JPMI's owner and operator, prevailed at trial in this antitrust action against General Motors Corporation (GM). A jury found that GM violated section one of the Sherman Antitrust Act, 15 U.S.C. § 1 (1988) (prohibiting conspiracies in restraint of trade), and awarded JPMI $986,000 in damages, which the district court automatically trebled to $2,958,000, *see id.* § 15. The jury also awarded damages to Peterson individually. GM then moved for judgment as a matter

of law (JAML). The district court grated the motion with respect to Peterson, but denied the motion with respect to JPMI. *Lovett v. General Motors Corp*, 769 F. Supp. 1506, 1522 (D. Minn. 1991). We have already decided Peterson's appeal, *Lovett v. General Motors Corp.*, 975 F.2d 518 (8th Cir. 1992), and now consider GM's appeal. We reverse the denial of JAML to GM.

GM markets Buick, Cadillac, Chevrolet, Oldsmobile, and Pontiac vehicles through more than ten thousand dealers. The dealer network is GM's only means to sell its products and to provide presale, point-of-sale, and postsale services to consumers. GM analyzes its dealer network to ensure it has the correct number of properly located dealers of the appropriate size so that GM can provides customers with a convenient arrangement of dealerships and can successfully compete with other auto makers.

Dealer Sales and Service Agreements govern the relationship between GM and each of its dealers. Under the agreements, GM assigns dealers an area of primary responsibility (APR) for the purpose of evaluating performance. Dealers agree to sell and service the product lines effectively and to promore new vehicle sales in their APR's through their own advertising and sales promotions. Dealers must maintain an adequate sales force and provide presale information to consumers. Dealers can sell to any customer, located anywhere, at any price, but must service GM vehicles regardless of where they were purchased. For its part, GM agrees to distribute vehicles in a fair and equitable manner and to explain its distribution method to dealers. GM has final discretion in accepting orders and distributing vehicles. One factor that affects distribution is sales potential in a dealer's APR.

In late 1980, JPMI entered into five-year Sales and Service Agreements with GM's five divisions. JPMI's dealership was located in Lake City, Minnesota, approximately seventy miles from the Twin Cities. JPMI's APR did not include the Twin Cities. According

to GM guidelines, JPMI's facility could not support servicing between 200 and 250 new car sales annually. From late October 1980 until late February 1983, JPMI operated as a conventional dealer selling motor vehicles from purchased inventory for individually negotiated selling prices, i.e., the manufacturer's suggested retail price (sticker price) less a particular amount negotiated with each buyer. On February 28, 1983, JPMI began marketing all vehicles at $49 over factory invoice. Under this program, JPMI disclosed the factory invoice amount to any potential customer, then added $49 to that price. JPMI reduced the number of cars kept on the lot at the dealership and began operating primarily on a "sold order" basis, meaning customers would purchase new vehicles that GM had not yet made, then JPMI would order the vehicle. When JPMI implemented the program, JPMI began advertising in Twin Cities newspapers. The advertisements encouraged buyers to order cars over the telephone or by mail.

JPMI's new marketing strategy increased its sales to more than 700 vehicles in 1983 and more than 1000 vehicles in 1984, but JPMI's service business did not grow proportionately. Due to JPMI's lower prices and distant location, GM customers in the Twin Cities area often placed their new car orders with JPMI over the telephone or by mail. Predictably, lost sales bothered Twin Cities dealers, who complained to GM about JPMI's $49 over factory invoice program. Dealer associations and individual dealers complained that JPMI's program was detracting business from the Twin Cities area and reducing their profits by about $300 per vehicle. They asked GM to take strong action to eliminate JPMI's program. GM did not respond to the complaints, solicit the views of the dealers or associations, or consult with them. GM filled JPMI's new Buick orders until February 1984, when GM began to restrict JPMI's allocation of vehicles. GM decided to reduce JPMI's allocation after discussing alternative strategies during in-house deliberations. In March 1984,

GM formally notified JPMI that Buick would not be able to fill as many of JPMI's orders as in the past, and JPMI should reconsider its marketing strategy. GM did not inform the dealers or dealer associations of its decision. Soon after GM restricted JPMI's car supply, JPMI filed for bankruptcy.

At trial, Lovett contended various Twin Cities GM dealers and GM conspired to reduct JPMI's allocation of vehicles to lessen price competition in the Twin Cities area. In other words, Lovett contended GM used decreased supply as a lever to force JPMI to stop selling vehicles at $49 over factory invoide and to stabilize prices at their earlier higher levels (about $300 over factory invoice). The jury found that "[GM] [d]ealers, in an attempt to substantially restrain price competition, conspire[d] to induce [GM], or one of its divisions, to reduce the allocation of automobiles to [JPMI]" and that GM knowingly became a member of the conspiracy.

GM asserts the district court should have granted its motion for JAML because Lovett did not show GM joined any dealer conspiracy. To establish a violation of 15 U.S.C. § 1, Lovett had to show there was a conspiracy between GM and its dealers. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984). Because there is no direct evidence of conspiracy in this case, we must decide whether a reasonable juror could infer the existence of a conspiracy from the circumstantial evidence. Although we view the evidence and all reasonable inferences in the light most favorable to Lovett when reviewing the district court's denial of JAML, *McCabe's Furniture, Inc. v. La-Z-Boy Chair Co.*, 798 F.2d 323, 327 (8th Cir. 1986), the range of permissible inferences from ambiguous evidence is limited in a section one case, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986).

Section one does not prohibit a manufacturer from taking independent action against a dealer. *Monsanto*, 465 U.S. at 761. This is so because a manufacturer may

have its own valid business reasons for taking the adverse action. A manufacturer often wants to ensure its dealers earn enough profit to pay for services and promotional activities that are necessary to market the manufacturer's product efficiently. *Id.* at 762-63; *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 55 (1977). Manufacturers also have an interest in preventing "free riding." *Monsanto*, 465 U.S. at 762-63; *see Sylvania*, 433 U.S. at 55. A free rider problem may arise when a manufacturer's dealers offer presale, point-of-sale, or postsale services. *Davis-Watkins Co. v. Service Merchandise*, 686 F.2d 1190, 1195 n.8 (6th Cir. 1982). Price-cutting dealers are often able to sell at lower prices by avoiding the cost of providing these services. *Id.* Consumers can take advantage of the services provided by dealers who do not cut their prices, but purchase the product from the price-cutting dealer. *Id.* Thus, the dealers who do not cut their prices perform essential services without benefitting from sales. *Id.* Free riding is a great concern in the automobile industry because service and repair are vital. *Sylvania*, 433 U.S. at 55. The availability and quality of service and repair affect a manufacturer's goodwill and the competitiveness of the manufacturer's product. *Id.* Accordingly, a manufacturer can take action against a price-cutting dealer without fear of antitrust liability if the action is the product of the manufacturer's independent decision that the price-cutting dealer undermines the well-being of the manufacturer's dealer network, *Helicopter Support Sys., Inc. v. Hughes Helicopter, Inc.*, 818 F.2d 1530, 1533 (11th Cir. 1987), even though the manufacturer learns about the price-cutting dealer's behavior from dealers "whose principal or perhaps only concern is with protecting their prices," *Morrison v. Murray Biscuit Co.*, 797 F.2d 1430, 1440 (7th Cir. 1986).

Because a fine line separates unlawful concerted action from legitimate business practices, an antitrust conspiracy cannot be inferred from "highly ambiguous

evidence." *Monsanto*, 465 U.S. at 763. Conduct that is as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. *Matsushita*, 475 U.S. at 588. Thus, evidence that a manufacturer took adverse action against a dealer following, or in response to, price-related complaints from other dealers is not enough to suport an inference of conspiracy. *Monsanto*, 465 U.S. at 763-64. Instead, the price-cutting dealer must present additional evidence tending to exclude the possibility that the manufacturer took the adverse action independently. *Id.* at 764; *see Matsushita*, 475 U.S. at 588. "[D]irect or circumstantial evidence that reasonably tends to prove that the manufacturer and [complaining dealers] had a conscious commitment to a common scheme designed to achieve an unlawful objective" excludes the possibility of independent action. *Monsanto*, 465 U.S. at 768. An inference of conspiracy must be "reasonable in light of the competing inferences of independent action." *Matsushita*, 475 U.S. at 588.

The district court concluded Lovett produced enough additional evidence from which a reasonable jury could find GM did not act independently. 769 F. Supp. at 1511-13. We believe the district court failed to recognize that Lovett's evidence is as consistent with permissible unilateral conduct on GM's part as it is with illegal conspiracy, and that *Monsanto* does not permit a jury to infer the existence of a conspiracy from ambiguous evidence. We conclude an inference of conspiracy is unreasonable in view of the strong competing inference that GM acted independently to preserve its distribution system.

After learning of JPMI's $49 over factory invoice program from local newspapers in late February 1983, GM representatives began to scrutinize JPMI's sold car orders. GM became concerned when JPMI's sold orders increased substantially. An Oldsmobile zone manager, Kruger, visited JPMI in late April 1983 and told

Peterson that the new marketing program might "breed more car orders than [Kruger] could possibly cover under a good equitable distribution system." Kruger got angry and expressed opposition to the program. The Cadillac zone manager, Grogg, also visted JPMI. Grogg told Peterson that the availability of Cadillacs was limited and Peterson should keep his orders within existing guideline figures. Grogg also informed Peterson the Twin Cities Cadillac dealers were very upset and JPMI should shop its program.

In September 1983, Walser, the president of the Twin Cities Buick dealers' association and a large Twin Cities Buick dealership, called the Buick zone manager, Pirtle, and asked Buick to take strong action to stop JPMI's program for the association. Pirtle stated he would not discuss JPMI with Walser or the association. Walser also may have made his complaints known to GM executives during a social gathering at about the same time.

In October 1983, GM circulated an internal memo listing several alternative strategies for dealing with the $49 over factory invoice marketing program, which about 20 GM dealers were using nationwide. One suggested strategy was to limit vehicle allocations based on some measure of market potential in the dealer's APR. The following month, GM conducted conference calls among its own marketing staff, divisional sales personnel, and lawyers about the $49 over factory invoice program. GM discussed the program during more internal conference calls in January 1984, and eventually decided to restrict vehicle allocation. In February 1984, GM set the cutback of JPMI's vehicles in motion. No GM dealers or dealer associations were involved in GM's deliberations.

On February 8, 1984, a Buick district manager, Picker, wrote a memorandum to his supervisor, Buick zone manager Pirtle, reporting dealer complaints about the $49 over factory invoice program. Picker reported that JPMI's program was having an adverse effect on

the profits of Twin Cities dealers and threatened to undermine the operation of dealerships designed to promote customer satisfaction. On February 15, 1984, GM's attorneys and division managers met in Minneapolis to make sure all GM divisions administered GM policy to JPMI uniformly.

On March 6, 1984, Walser telephoned Pirtle and stated that Walser was resigning from the Twin Cities Buick Dealer Advertising Association because of Buick's reluctance to address the problem of JPMI's program. Pirtle received a letter from Walser on March 15, 1984 confirming his conversation on March 6. The letter stated that Twin Cities dealers had to reduce their gross profits substantially in order to compete with JPMI, and complained about having to service cars sold by JPMI. In the letter, Walser also said he found GM's "refusal to discuss the matter totally frustrating."

On March 9, 1984, Pirtle received a memo from Buick's director of car distribution stating that Buick could not distribute cars to JPMI based on sold orders only and, at the same time, maintain a fair and equitable distribution for all Buick dealers in the zone. The memo ordered Pirtle to bring preferencing (method of giving priority to dealers' car orders for production) in line with Buick's distribution system and sales potential in JPMI's APR. On March 14, 1984, Pirtle wrote Peterson a letter stating that because the supply of Buicks was decreasing, Buick would "no longer be able to fill as great a percentage of [JPMI's] orders as . . . in the recent past." Pirtle stated JPMI would still receive enough Buicks to fulfill its sales responsibilities in its APR plus any extra vehicles for which demand did not exceed supply. In April 1984, an internal GM memo stated GM's overriding consideration in distributing cars to JPMI was the dealership's planning potential.

Two JPMI customers testified about their experiences with GM and Twin Cities GM dealers. Salespersons at Twin Cities dealerships told an

impatient JPMI customer, Brooks, that he could get the car he had ordered in August 1983 more quickly if he purchased the car from them at sticker price. One of the salespersons stated, "[W]e've gotten together with the area's coop[erative dealers association] and GM and we're going to run that $49 over place out of business." Brooks wrote a letter to GM reporting his experience and the statement. Johnson, a customer who ordered a new Buick from JPMI in April 1984, sought to purchase a car from two Twin Cities dealers after waiting nine weeks for delivery. In the fall of 1984, both Twin Cities dealers told Johnson they could obtain the car he wanted in four to six weeks if he was willing to pay at or near the sticker price. Johnson also called GM to find out why JPMI had not received his car. A GM employee told Johnson that JPMI had not preferenced his car. When confronted with this statement's falsity, the GM employee told Johnson, "[Y]ou know what is happening."

In our view, Lovett's evidence is ambiguous. The evidence relating to Kruger and Grogg visiting JPMI shows nothing more than alert GM division managers addressing a potential distribution problem. As for Grogg's statement that JPMI should stop its program, Peterson admitted he did not know whether Grogg was speaking for GM or for the Cadillac dealers' association. Thus, Grogg's statement does not help JPMI prove GM joined the alleged conspiracy. Walser's letter to GM in March 1984 makes clear that no one at GM had ever discussed JPMI with him, and that he had no inkling GM had already cut back JPMI's supply. Because GM had already cut JPMI's supply when Walser wrote the letter, the letter is not coercive and actually suggests GM acted alone. The failure of the Walser evidence is significant because Lovett portrays Walser as a major player in the alleged conspiracy. Further, GM's internal memoranda and discussions are consistent with GM addressing an impending threat to its dealer network. Complaining dealers were not present during GM's

meetings, and there is no evidence that the dealers threatened to terminate their dealerships with GM to coerce GM's actions. GM steadfastly refused to discuss JPMI with other GM dealers or associations in response to their complaints, or to meet with dealers or dealer associations. GM did not invite dealers to their meetings or ask for their input in GM's internal deliberations, and did not even inform the dealers after GM restricted JPMI's vehicle allocation. GM's internal deliberations are consistent with GM independently evaluating alternative ways to deal with the price-cutting dealers and independently deciding to restrict JPMI's allocation. As for the customer related evidence, the Brooks letter was not admitted to show its truth and the incident took place before GM allegedly joined the conspiracy or cut back JPMI's car supply. The Johnson incident happened after GM had already restricted JPMI's allocation. Thus, the GM employee's statement was ambiguous. Although GM was less than honest with JPMI while it was deciding to cut JPMI's allocation, this does not show GM was not acting alone.

We agree with GM that the evidence is as consistent with GM taking independent action to preserve its distribution system as with conspiracy. JPMI threatened GM's dealer network as a free rider. Although JPMI had trained salespersons who provided presale and point-of-sale services and a service department that provided postsale services, JPMI's price-cutting strategy allowed it to avoid an increase in these overhead costs proportionate to its increase in sales. Because some Twin Cities customers apparently browsed at Twin Cities dealerships to select a model, then placed their car order with JPMI over the telephone or by mail, JPMI avoided many presale and point-of-sale costs. JPMI also avoided the cost of maintaining a larger postsale service department to repair all the vehicles it sold because the Twin Cities customers would take their vehicles to local dealers, who were required by their dealer agreements to service

GM vehicles sold elsewhere. Twin Cities dealers were compensated for postsale services, but the quality of services provided by these dealers would eventually decrease with the profitability of their dealerships. Thus, GM's legitimate business goals of quality service and customer satisfaction would ultimately be defeated.

We believe the jury's finding of a conspiracy in this case shows why cases arising under section 1 of the Sherman Act and based on highly ambiguous evidence should not be submitted to a jury. As the Supreme Court has explained, it is "extremely difficult for the manufacturer to convince a jury that its motivation [in taking action against a price-cutting dealer] was to ensure adequate services, since price cutting and some measure of service cutting usually go hand in hand." *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 727-28 (1988).

Lovett did not carry his burden to produce evidence tending to exclude the possibility that GM acted independently of its dealers when it restricted JPMI's allocation of vehicles. Because the evidence is as consistent with permissible unilateral conduct as with illegal conspiracy, the evidence is insufficient to support the alleged antitrust conspiracy. Accordingly, we reverse the district court's order denying GM's motion for JAML.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

United States Court of Appeals
For The Eighth Circuit

No. 91-2647MNMI

Thomas G. Lovett, etc.,
Appellee,

vs.

General Motors Corporation,
Appellant.

*
* Appeal from the
* United States
* District Court for
* the District of
* Minnesota.
*

This court's opinion of July 9, 1993, is hereby amended by substituting the attached pages for pages 1, 2, 4, 10, and 11 of the opinion.

September 3, 1993

Order Entered at the Direction of the Court:

s/s Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

United States District Court
District of Minnesota

Robert C. Neill, Trustee of the Bankruptcy Estate of John Peterson Motors, Inc., and Donald John Peterson, individually

JUDGMENT IN A CIVIL CASE

CASE NUMBER:
4-85 Civil 139

vs.

General Motors
Corporation and General
Motors Acceptance Corp.

☒ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☐ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That judgment is hereby entered in favor of John Peterson Motors, Inc., and against General Motors Corporation in the amount of $2,958,000 (representing the amount on the Special Verdict Form of $986,000 which has been trebled pursuant to 15 USC 15) plus reasonable attorney's fees. Judgment is hereby entered in favor of Donald John Peterson and against General Motors Corpration the amont of $798,600 (representing the amount of the Special Verdict Form of $266,200 which has been trebled pursuant to 15 USC 15) plus reasonable attorney's fees.

January 3, 1991
Date

FRANCIS E. DOSAL
Clerk
s/s Denise LaFond
(By) Deputy Clerk

United States District Court
District of Minnesota
FOURTH DIVISION

Thomas G. Lovett, Jr., Trustee of the Bankruptcy Estate of John Peterson Motors, Inc., and Donald John Peterson, individually,

Plaintiffs,

v.

General Motors Corporation,
Defendant.

Civil No. 4-85-139

ORDER

John A. Cochrane, Esq., Stewart C. Loper, Esq. and Cochrane & Bresnahan, 24 East Fourth Street, St. Paul, MN 55101-1099 and Ronald D. Sieloff, Esq., Michael D. Dittberner, Esq. and Sieloff and Bierman, Suite 938, Minnesota Building, 46 East Fourth Street, St. Paul, MN 55101, counsel for plaintiffs.

James S. Simonson, Esq., James F. Carroll, Esq. and Gray, Plant, Mooty, Mooty, & Bennett, 3400 City Center, 33 South Sixth Street, Minneapolis, MN 55402, and William B. Slowey, Esq., Assistant General Counsel, General Motors Corporation, New Center One Building, 3031 West Grand Boulevard, Detroit, MI 48232, counsel for defendant General Motors Corporation.

This matter is before the court on the following motions:

1. Defendant's motion for a judgment notwithstanding the verdict under Federal Rule of Civil

Procedure 50 or in the alternative for a new trial pursuant to Federal Rule of Civil Procedure 59; and

2. Plaintiffs' motion for costs and attorneys' fees pursuant to 15 U.S.C. § 15(a), D. Minn. LR 54.3(b) and the judgment of January 3, 1991.

Based on a review of the file, record, and proceedings herein, the defendant's motion for judgment n.o.v is granted as it relates to Donald John Peterson and denied as it relates to John Peterson Motors, Inc. Its motion for a new trial is denied and plaintiffs' motion for costs and attorney's fees is denied without prejudice pending appeal.[1]

BACKGROUND

Plaintiffs John Peterson Motors, Inc. ("JPMI"), represented by the trustee in bankruptcy, Thomas J. Lovett, Jr., and Donald John Peterson ("Peterson") commenced this action in 1985 against General Motors Corporation ("GM"),[2] asserting several common law claims and violations of various federal and state statutes.[3] The background facts have been set forth in an order dated July 12, 1989. *John Peterson Motors,*

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[1] *See, e.g., National Farmers' Org., Inc. v. Associated Milk Producers, Inc.*, 850 F.2d 1286, 1312 (8th Cir. 1988) (approving district court's delay in the determination of costs and attorney's fees pending appeal).

[2] Plaintiffs also brought claims against General Motors Acceptance Corporation but its motion for directed verdict was granted at the close of all evidence.

[3] Specifically, the complaint asserted violations of the Sherman Act, 15 U.S.C. § 1, and the Minnesota Antitrust Act, § 325D.49, *et seq.*; the federal Automobile Dealers Day in Court Act, 15 U.S.C. § 1221 *et seq.*; the Minnesota Motor Vehicle Sale and Distribution Regulations Act, Minn. Stat. § 80E.01 *et seq.*; the Minnesota Uniform Deceptive Trade Practices Act, Minn. Stat. § 325D.43 *et seq.*; common law fraud, promissory estoppel, tortious interference with business relationships, breach of the dealer sales and service agreements and violations of the Robinson-Patman and RICO Acts.

Inc. v. General Motors Corp., 613 F. Supp. 887 (D. Minn. 1985). In summary, JPMI was an authorized General Motors dealer in Lake City, Minnesota for Cadillac, Buick, Oldsmobile, Pontiac and Chevrolet motor vehicles. Between October 1980 and February 1983, JPMI operated as a conventional dealer, selling motor vehicles from purchased inventory to retail customers for negotiated prices. In February 1983, JPMI changed its sales and marketing strategy and began to engage in a "$49 and over" marketing program. Instead of advertising and selling motor vehicles at prices negotiated with each individual customer based on a list price, JPMI began to sell all automobiles at $49 over its dealer invoice.

At trial, plaintiffs, contended that prior to the change in marketing, the dealership had few problems and its relationship with GM was amicable. After JPMI adopted a $49 and over marketing strategy, plaintiffs claimed that JPMI began to have trouble obtaining cars from General Motors, that GM failed to preference cars ordered by JPMI, and that as time went on JPMI had to wait longer and longer for delivery. Plaintiffs further claimead that the problems arose after various Twin Cities' General Motors dealers pressured GM to take action against JPMI and conspired with GM to fix prices of motor vehicles at $200 to $300 above invoice prices. Plaintiffs maintained that GM accomplished the price fixing by substantially reducing JPMI's allocation of automobiles, thereby minimizing the dealership's ability to turn a profit at the lower price or to compete effectively with the Twin Cities' dealers. Plaintiffs argued that GM thus sought to force JPMI to discontinue its marketing program and instead comply with the marketing strategy used by the Twin Cities' dealers, who sold automobiles on a negotiated basis using list prices plus markups of $200 to $300.

The case went to the jury on two claims: (1) violation of Section 1 of the Sherman Act; and (2) failure to perform according to the terms of JPMI's

sales and service agreements. The jury found that GM did not fail to perform in good faith the terms of the sales and service agreements but found that various General Motors dealers formed an antitrust conspiracy which GM knowingly joined. As a result of this conspiracy, the jury found that JPMI suffered damages of $986,000, which after trebling resulted in a judgment of $2,958,000. The jury further found that Donald John Peterson suffered individual losses of $266,200 which trebled resulted in damages of $798,600.[4] Plaintiffs seek costs and attorney's fees pursuant to the Sherman Act. General Motors moves for a judgment n.o.v. or in the alternative for a new trial.

DISCUSSION

The standard for granting a judgment n.o.v. is the same as that for a directed verdict: whether a reasonable juror could have reached the verdict on the evidence presented. *City of Omaha Employees Betterment Ass'n v. Omaha*, 883 F.2d 650, 651 (8th Cir. 1989) (citation omitted). The court is "not free to weigh the evidence, to pass on the credibility of witnesses, or to substitute [its] judgment for that of the jury", *Karlen v. Ray e. Friedman & Co. Commodities*, 688 F.2d 1193, 1197 (9th Cir. 1982) (citation omitted), but rather views the evidence "in the light most favorable to the party

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[4] General Motors argued that Donald John Peterson as an individual had no standing to bring the antitrust action. Courts generally hold that individuals have no antitrust standing because "other parties that have been more directly harmed" are available to sue. *Cargill, Inc. v. Montfort, Inc.*, 479 U.S. 104, 111 n.6 (1986); *Associated General Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 534-35 & n.31 (1983); *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 466-67 (1982). At the hearing, the court ruled that Donald John Peterson lacked standing to bring the alleged antitrust claims, and thus General Motors' motions regarding Donald John Peterson as an individual was granted and judgment will be entered against him on the antitrust claims notwithstanding the verdict.

who prevailed before the jury." *City of Omaha Employees Betterment Ass'n*, 883 F.2d at 651 (citation omitted). This means that the court:

> (1) resolve[s] direct factual conflicts in favor of the nonmovant, (2) assume[s] as true all facts supporting the nonmovant which the evidence tended to prove, (3) give[s] the nonmovant the benefit of all reasonable inferences, and (4) den[ies] the motion of the evidence so viewed would reasonable jurors to differ as to the conclusions that could be drawn.

Pumps & Power Co. v. Southern States Indus., Inc.,, 787 F.2d 1252, 1258 (8th Cir. 1986).

A motion for a new trial is almost entirely within the trial court's decision, *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980) (per curiam), and:

> the true standard for granting a new trial on the basis of the weight of the evidence is simply one which measures the result in terms of whether a miscarriage of justice has occurred.

Fireman's Fund Ins. Co. v. Aalco Wrecking Co., Inc., 466 F.2d 179, 187 (8th Cir. 1972); *Leichihman v. Pickwick Int'l. Inc., 589 F. Supp. 831, 833 (D. Minn. 1984). A new trial is not to be granted merely because the court may have reached a result different than that reached by the jury. Fireman's Fund*, 466 F.2d at 186-187. With these standards in hand, the court will examine each of defendant's grounds for its motion.

1. *General Motor's Claim That the Evidence Was Insufficient to Establish a Conspiracy*

GM first contends that evidence adduced at trial was insufficient for a reasonable jury to conclude that a conspiracy existed between GM and various General Motors dealers to eliminate JPMI's $49 over marketing program and thereby stabilize the price of General Motors automobiles in the Twin Cities area. Plaintiffs, however, proffered sufficient evidence to demonstrate

the existence of the alleged conspiracy.

a. Evidence Supporting the Existence of A Dealers' Conspiracy

Plaintiffs proffered sufficient evidence for a reasonable jury to conclude that various Twin Cities GM dealers acted in concert to eliminate JPMI's marketing program. For example, James E. Pirtle ("Pirtle"), GM's zone manager for the Twin Cities' Buick zone, wrote a memorandum to his file on September 27, 1983 recounting his conversation about JPMI with Jack Walser, a Twin Cities' GM dealer ("Walser"). The memorandum states that:

> [o]n September 26th, the writer received a call from Jack Walser, president of the Twin Cities Dealers' Advertising Association. Mr. Walser related to the writer the group's displeasure with activities and advertising policies of John Peterson Motors, Inc., Lake City, MN and indicated that the zone should take strong action to correct the problem. He additionally requested a meeting with the Twin City Dealers to discuss the matter.

(Plaintiffs' Exhibit No. 218).[5]

Plaintiffs also introduced a recommendation by the National Cadillac Dealer Council which encouraged the Cadillac Division to take strong steps to eliminate marketing programs like JPMI's and further requested that GM take action to discourage distress advertising. (Plaintiffs' Exhibit No. 214).

Plaintiffs further introduced a memorandum dated February 8, 1984 from Mark Picker, GM's district

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[5] Plaintiffs introduced another Pirtle memorandum, dated the following day, from which a reasonable jury could also conclude that members of the Twin Cities Dealers' Association were acting in concert. (Plaintiffs' Exhibit No. 211). This memorandum also indicates that Walser, acting on behalf of the association, requested a meeting with Pirtle but that Pirtle refused to discuss JPMI in a meeting with the association.

manager for Buick, to Pirtle, which Pirtle received on February 9, 1984. (Plaintiffs, Exhibit No. 212). The memorandum indicates that comments made by "dealers and salespeople" about JPMI's marketing program were increasing and that it was "becoming increasingly difficult to conduct normal business due to the strain created by the perception that Buick and General Motors are doing nothing to improve the situation." It further notes that a group of service managers also discussed JPMI at a service managers' meeting. The memorandum states that JPMI's marketing activities were "hurting the gross profit on many car sales" in the Twin City area and that JPMI's marketing program "threatens to undermine the operation of some dealerships" because Twin City dealers "need a fair gross profit on their car sales to justify their investment" in their dealerships. A reasonable jury could conclude that this memorandum also suggests group activity by the dealers who were concerned about maintaining price levels.

Other evidence also reflects dealers' concern about JPMI's effect on price levels. In a letter to Pirtle dated March 12, 1984, Jack Walser indicated that his dealership had been forced to reduce his gross sales prices $200 to $300 because of JPMI's marketing program. (Plaintiffs' Exhibit No. 213). In this letter Walser also refers to another letter (Defendant's Exhibit No. 670) about JPMI that was written by W.E. Abraham, executive vice president of the Greater Metropolitan Automobile Dealers Association of Minnesota, to the Minnesota Attorney General's office. Abraham's letter, which copied Walser, also indicates cooperative action by General Motors' dealers concerned JPMI's marketing program.[6]

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[6] Abraham's letter alleges that JPMI's advertising was "deceptive" because it compared Pontiac sticker prices with Buick dealer prices (although the ad did disclose that the Buick prices were $49 over invoice while the Pontiac prices were "MSRP", an

(continued...)

Noel Kruger, the Oldsmobile zone manager, further testified that the $49 and over marketing program produced prices that were about $300 less than the amount that the Twin Cities' dealers were making in gross profit on Oldsmobiles.

The proffered evidence was sufficient to support the jury's affirmative answer to Question 1 of the Special Verdict Form, which stated:

> 1. Did General Motors Dealers, in an attempt to substantially restrain price competition, conspire to induce General Motors Corporation, or one of its divisions, to reduce the allocation of automobile to John Peterson Motors?

b. Evidence that GM Joined A Dealers' Conspiracy

After finding that General Motors dealers conspired to substantially restrain price competition, the jurors further found that GM knowlingly became a member of that conspiracy in Question 2 of the Special Verdict Form. To explain its actions, GM proffered evidence seeking to demonstrate that it had reduced its allocation of motor vehicles to JPMI for valid business reasons that were entirely independent of any dealer complaints or actions and contends that plaintiffs failed to produce sufficient evidence independent of dealer complaints to prove GM's membership in a dealers' conspiracy.

Under *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984), evidence of a dealer complaint followed by a manufacturer's action is insufficient as a matter of law to permit a jury to infer the existence of a manufacturer-dealer conspirac
Court ruled that:

> [t]here must be evidence that tends to exclude the

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[6] (...continued)
abbreviation for Manufacturers Suggested Retail Prices). The letter suggested that "[t]he reason for this 'deception' is that [JPMI did] not have many Pontiacs for sale, but [did] have Buicks."

> possibility that the manufacturer and the nonterminated distributors were acting independently ... [T]he antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.'

Id. at 764 (citations omitted). Although dealer complaints may have some probative value, the burden remains on the plaintiff "to introduce additional evidence sufficient to support a finding of an unlawful contract, combination, or conspiracy." *Id.* at 764 n.8. Conspiracies, however, may be inferred from actions taken. *Eastern States Retail Lumber Dealers Ass'n v. United States*, 234 U.S. 600, 612 (1914). The character of a conspiracy is to be determined by an analysis of the activities as a whole. *United States v. Patten*, 226 U.S. 525, 544 (1913) (citations omitted).

Monsanto also recognized that determining a manufacturer's motives is critical, because concerted actions may be prohibited while the same actions, if independent, are permitted. 465 U.S. at 761 (citing *United States v. Colgate Co.*, 250 U.S. 300, 307 (1919) for the proposition that "[a] manufacturer of course generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently").

Plaintiffs did introduce evidence that the automobile dealers complained to GM about JPMI. Walser, the president of Walser Buick and the dealers' advertising association, became so upset about JPMI's marketing program that he called Pirtle, the Buick zone manager, and urged Buick, on behalf of the dealers' association, to take strong action to stop the program. Pirtle previously brought the matter to the attention of the Buick Motor Division, but he refused to discuss the marketing program with Walser. (Plaintiffs' Exhibit No. 218). Another exhibit reflects further contact by Walser on behalf of the Twin City Buick Dealers' Advertising

Association urging Pirtle to take action against JPMI. (Plaintiffs' Exhibit No. 211).[7]

Mark Picker, district manager in the Buick Division, also wrote a memorandum to Pirtle, his supervisor, detailing dealer complaints about the $49 and over program. That memorandum discusses the effect that the program was having on other Twin City dealers, including the fact that those dealers were reducing their profit margins as a result of the competition from JPMI. (Plaintiffs' Exhibit No. 212). At about the same time, the Cadillac Dealer Council complained to Cadillac about the $49 and over marketing plan (Plaintiffs' Exhibit Nos. 214 & 215).

General Motors contends that, aside from the evidence of dealer complaints, plaintiffs produced no independent evidence of GM's role in the conspiracy. Plaintiffs, however, proffered sufficient evidence from which a reasonable jury could conclude that GM did not act independently of the dealers but instead joined a dealers' conspiracy. For example, Carol Proud, the former bookkeeper for JPMI, testified that Doug Thompson the district manager for GM's Buick Division, told her that as a result of other dealers' complaints to GM, he was no longer responsible for the number of automobiles allocated to JPMI.

Two managers from GM also visited JPMI concerning the marketing program. Noel Kruger, the Oldsmobile zone manager, visited JPMI on April 21, 1983. He discussed the $49 and over marketing program and threatened JPMI with accelerated legal action if the dealership continued the program. According to the testimony of former JPMI's employees Robert Schmidt and Carol Proud, Kruger became so angry with Peterson that he slammed the door and broke the wall

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[7] Walser also conceded, prior to a memory lapse, that he may have discussed JPMI's marketing program with the "big brass" from Buick's Motor Division when they came to town. (Walser Deposition pp. 86-87).

on his way out. After the incident and for the first time in twenty-eight years as an employee with GM, Kruger directly contacted GM's legal department about a dealer's activities, specifically JPMI's marketing program. GM's legal department acknowledged the discussion about threatened legal action but claimed that it was merely a misunderstanding between Kruger and Peterson. (Plaintiffs' Exhibit No. 351).

Otto Ray Grogg, the Cadillac zone manager, also visited JPMI. Peterson testified that Grogg told him that the Twin City area Cadillac dealers were extremely upset by Peterson's marketing program and that they wanted JPMI to discontinue the program. Peterson stated that Grogg told him that the metro Cadillac dealers could "buy and sell the entire town of Lake City." Peterson further testified that he wasn't sure if Grogg was speaking on behalf of GM or on behalf of the Twin City area Cadillac dealers.

In February 1984, Don Hudler of General Motors scheduled a meeting with zone managers in Minneapolis to discuss the Peterson situation. (Plaintiffs' Exhibit No. 435). Al Connors, a Chevrolet representative, testified that the purpose of the meeting, which took place on February 15, 1984, was to discuss the JPMI problem and to make sure that all of GM's divisions were "singing from the same hymnal".

A reasonable jury could conclude that evidence presented by various customers also demonstrated that GM's motive in reducing JPMI's allocation was not prompted by independent business factors but rather was intended to substantially restrain price competition in furtherance of the conspiracy. Keith Johnson, who ordered a Buick Park Avenue, testified that he waited nine weeks for delivery from JPMI, then sought to purchase a vehicle from another dealer. Personnel at both Buerkle Buick and Stephens Buick informed him that he could have a new Park Avenue automobile delivered in four to six weeks if he was willing to pay at or near the sticker price. In seeking to determine

what had happened to his automobile order, Johnson contacted General Motors directly and was told by Jean McGowan that the car Johnson ordered had not been "preferenced" by JPMI. JPMI had preferenced the car, and when confronted with this fact, McGowan told Johnson, "you know what is happening". J. Brooks, another customer of JPMI, ordered a car and was told by other dealers that he could get a car in four to six weeks if he was willing to pay at or near sticker price. He was told that the Twin Cities' dealers had convinced General Motors "to run JPMI out of business".

Plaintiffs also introduced evidence from which a reasonable jury could conclude that GM cut back on its allocation of cars to JPMI in furtherance of the conspiracy. Carol Proud testified that Doug Thompson, the district manager for the Buick Division of GM, told her that he was no longer responsible for JPMI's allocation because of dealer complaints. In November 1983, a conference call schedule was established among various GM division employees to discuss the $49 and over marketing problem. (Plaintiffs' Exhibit No. 437). During this same time period, James Cubbin, an attorney at GM, developed a list of suggested strategies for handling the "distribution problem." (Plaintiffs' Exhibit No. 436).[8] A memorandum from the Oldsmobile Division further suggested various ways to address the marketing program. (Plaintiffs' Exhibit No. 434).[9] Both

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[8] Some of the "strategies" included: limiting the allocations to the discount dealers "based on some measure of market potential in [the] dealer's Area of Preliminary Responsibility"; limiting allocations based on "dealer's facilities"; limiting sales to the dealer's "Area of Primary Responsibility"; or "[d]o nothing and let market forces solve problem by allowing survival of the fittest."

[9] The memo noted that subjects to be discussed during upcoming conference calls include:

> (A) Any matters relating to pricing are most sensitive and involve anti-trust [sic] problems.

(continued...)

suggested that one way to remedy the "distribution problem" was to limit in some manner the distribution of cars to JPMI and other $49 and over dealers.

In early 1984, the Buick Motor division did begin to reduce JPMI's allocation of cars. A memorandum from William Sanger ("Sanger Memo"), the car distributor for the Twin City Buick zone, indicates that JPMI's Buick allocation had been reduced to the "in line with planning potential" in February. (Plaintiffs' Exhibit No. 511). On March 9, 1984, James Krause, of the Buick Motor Division, wrote to Pirtle advising him of an "imbalance" in the distribution of vehicles in the Minneapolis zone. (Plaintiffs' Exhibit No. 453).[10] Although the cutback actually occurred several weeks earlier, Pirtle advised Donald John Peterson on March 14, 1984, that the supply of automobiles that JPMI would be receiving in the future would be significantly reduced and that Buick would be distributing vehicles to JPMI in accordance with "the requirements of your dealership's Area of Primary Responsibility." (Plaintiffs' Exhibit No. 446).[11] Pirtle also informed Peterson that

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[9] (...continued)

(B) Zones are to distribute cars in keeping with the established distribution procedures and are to be very careful, namely, do not restrict distribution to Dealers or provide extra cars beyond the earned rate.

[10] At about the same time, Walser informed Pirtle that because of the decrease in automobile prices resulting from JPMI's marketing program, his dealership was forced to resign from the Twin City Buick Dealers' Advertising Association. (Plaintiffs' Exhibit No. 213).

[11] Plaintiffs introduced evidence that communications between Pirtle and Peterson in early February 1984 did not indicate the possibility of any reduction in JPMI's allocation of Buicks. Plaintiffs contended that reductions began almost immediately after Pirtle received the Picker memorandum of February 8, 1984, which detailed the increasing number of dealer complaints. (Plaintiffs' Exhibit No. 212). Donald John Peterson did not receive actual notice of the reduction until several weeks later.

"[b]ecause we anticipate product demand to continue at relatively high levels for the forseeable future, I recommend you review carefully your promotional programs." In a March 16, 1984 memo to the file, Pirtle also indicated that he had been instructed to reduce the allocation of vehicles to JPMI. (Plaintiffs' Exhibit No. 452).

Prior to the "distribution" problems, Pirtle told Donald John Peterson in the fall of 1983 that the zone operated on a turnover distribution system. (Plaintiffs' Exhibit No. 83). GM subsequently adopted a new method of distributing automobiles in the zone, based on a factor called "planning potential". (Plaintiffs' Exhibit No. 511). Plaintiffs introduced evidence that planning potential was a factor that GM had never before used to allocate vehicles and argued that GM adopted the planning potential program to confine JPMI's sales activities to its area of primary responsibility around Lake City, Minnesota, thus minimizing the impact that the $49 and over program had on prices charged by other Twin Cities' dealers.

Plaintiffs also introduced evidence that GM sought to conceal the reduction in JPMI's allocation of automobiles. In a telephone conversation with Donald John Peterson on February 8, 1984, Pirtle told Peterson that Buick would continue to preference cars that JPMI ordered. (Plaintiffs' Exhibit No. 562A). The Sanger Memo, which was dated February 9, 1984, indicates, however, that the decision had already been made to cut back Peterson's allocation to be "in line" with JPMI's "planning potential." (Plaintiffs' Exhibit No. 511). Moreover, General Motors told JPMI that it was forced to reduce JPMI's allocation because there was a shortage of vehicles, when in fact the Minneapolis zone had almost a 50 day supply, which was an adequate supply for the zone. (Testimony of Lyman E. Ostlund; Plaintiffs' Exhibits nos. 502E-F). Pirtle also conceded that the zone had a 58 day supply. (Plaintiffs' Exhibit No. 394). Other testimony indicated that a 30 day

supply was adequate for the Minneapolis zone. (Testimony of Don Hudler). The zone office also told customers that all of its dealers knew what their allocations would be but refused to tell Donald John Peterson how many of JPMI's automobiles would be preferenced. (Plaintiffs' Exhibit Nos. 339 & 342).

Under the *Monsanto* standard, the plaintiffs introduced sufficient additional evidence to support a finding that GM acted in furtherance of the dealers' conspiracy. The jury was entitled to evaluate the credibility of witnesses and draw inferences regarding their motives and actions. Although GM presented evidence that GM acted for legitimate business reasons, plaintiffs presented evidence that GM acted with an unlawful purpose and knowingly joined the dealer's conspiracy, and the jury chose to believe the plaintiffs' evidence regarding GM's motives. Viewed as a whole, there was sufficient evidence to establish that GM joined a conspiracy, and the jury so concluded. Therefore GM's motion for judgment n.o.v. or a new trial based on insufficient evidence is denied.

2. General Motors' Contention That the Rule of Reason is the Correct Antitrust Standard

The court instructed the jury using a per se standard. GM argues, however, that plaintiffs alleged only that GM wrongfully reduced its allocation of motor vehicles to JPMI and that this action is properly characterized as a vertical nonprice restraint which should be evaluated under the rule of reason. Plaintiffs did not prove the requisite elements of a cause of action under the rule of reason and thus GM urges the court to set aside the verdict or grant a new trial.

GM relies on *Business Elec. Corp v. Sharp Elec. Corp.*, 485 U.S. 717 (1988), to support its contention that the court should apply a rule of reason standard to the present facts. It argues that *Sharp* recognizes a "presumption in favor of the rule of reason" in antitrust cases. *Id.* at 726 (discussing the proper "scope of per se illegality for vertical restraints"). GM further contends

that in situations like the present one, if the court does not apply the rule of reason, "it is extremely difficult for the manufacturer to convince a jury that its motivation was to insure adequate services, since price cutting and some measure of service cutting usually go hand in hand." *Id.* at 727-28 (discussing vertical restraints).

Plaintiffs argue that GM's improperly relies on *Sharp* to support its claim that the present case involves a vertical conspiracy which is subject to the rule reason. Plaintiffs argue that *Sharp* merely holds that an agreement between a manufacturer and one dealer to terminate another dealer for price cutting is a vertical agreement which is not per se illegal in the absence of evidence which establishes an agreement on price or price level. *Id.* at 735-36.[12] Plaintiffs contend, however, that GM mischaracterizes the nature of their claims and that the evidence demonstrates an essentially horizontal conspiracy between dealers in which GM joined. Plantiffs argue that the conspiracy resulted in threatened legal action, heightened audit activity by General Motors Acceptance Corporation and a substantial reduction in JPMI's automobile allocation by Buick Motor Division. Plaintiffs claim that those actions were undertaken to eliminate JPMI's $49 and

[12] In *Sharp*, Business Electronics was one of two Sharp dealers in Houston. Sharp provided dealers with published lists of minimum retail prices but did not require dealers to charge those minimum prices or any other specific price. Business Electronics' prices were often below Sharp's suggested retail prices and also below those of Hartwell, the other Sharp dealer in Houston. Hartwell complained about Business Electronics' prices, and ultimately advised Sharp that it would terminate its dealer agreement if Sharp did not terminate Business Electronics' dealership. Sharp subsequently terminated Business Electronics' dealership and Business Electronics brought an antitrust action. The Supreme Court applied the rule of reason standard to the facts in *Sharp* because the agreement between the manufacturer and one dealer to terminate a price cutter constituted a vertial nonprice restraint. The Court held that such an arrangement would not per se illegal unless the surviving dealer surrendered its pricing discretion and agreed to set prices at some level. *Id.* at 726-27.

over program, thereby reducing price pressure on GM dealers in Twin Cities area and allowing those dealers to stabilize prices at or near sticker price. Plaintiffs contend that GM deliberately confuses the purpose of the alleged conspiracy, to substantially restrain price competition, with the method of its effectuation, to decrease JPMI's allocation of automobiles, and thus seeks to apply an inapposite body of law to support its contention that court should apply the rule of reason.

Plaintiffs rely on *United States v. General Motors Corporation* to support their contention that the alleged conspiracy was horizontal. 384 U.S. 127 (1966). In *General Motors*, GM conspired with some of its dealers to stop the sale of automobiles through discount outlets. The Court held that where GM, in response to dealer complaints, elicted an agreement from the dealers not to do business with the discounters, that activity was illegal per se. 348 U.S. 127, 147 (1966).[13] The Supreme Court stated that:

> inherent in the success of the combination in [*General Motors*] was a substantial restraint upon price competition——a goal unlawful *per se* when sought to be effected by combination or conspiracy.... And the *per se* rule applies even when the effect upon prices is indirect.

Id. at 147 (citations omitted).[14]

[13] The Eighth Circuit explained that "[a]lthough *General Motors* involved dual conspiracies, retailer-retailer and retailer-manufacturer, the [Supreme] Court's application of the per se rule points to the importance of the underlying horizontal nature of the arrangement. Substance should be more important than form." *Battle v. Lubrizol Corp.*, 673 F.2d 984, 989 (8th Cir. 1982) (citation omitted) (district court's subsequent grant of summary judgment for defendant was affirmed on other grounds by an equally divided court in *Battle v. Watson*, 712 F.2d 1238 (8th Cir. 1983) (en banc)).

[14] The Supreme Court noted that the "discount sales undercut the prices at which franchise dealers were able to, or chose to, compete"; that "[d]ealers and their salesmen complained to General

(continued...)

GM argues that *General Motors* is distinguishable from the present case because the Supreme Court in *General Motors* determined that GM acted in furtherance of a dealer conspiracy by compelling various dealers to take action that they otherwise would not have taken, such as repurchasing vechiles that the dealers had already sold to discounters and agreeing that they would not sell to discount houses in the future. GM argues that this compulsion is absent from the present case because the jury found that GM had made no wrongful demand on JPMI in connection with its sales and services agreements.[15] GM further contends that it made no effort to eliminate JPMI from any market. The jury found, however, that GM reduced its allocation of automobiles to JPMI in an effort to substantially restrain price competition. This reduction may be characterized as action by GM to further a dealer conspiracy, thereby eliminating price competition and confining JPMI to its area of primary responsibility. The *General Motors* Court held that:

> [e]limination, by joint collaborative action, of discounters from access to the market is a *per se* violation of the [Sherman] Act.

384 U.S. at 145.

GM further contends that plaintiffs' reliance on *General Motors* is misplaced because antitrust law has

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[14] (...continued)
Motors about sales lost through inability to meet the discounters' prices"; and that customers chose to do business with the discounters not only because of lower prices but also to avoid the necessity of "haggling over price." *Id*, at 133 n.7.

[15] GM bases its contentionon the jury's negative response to the special verdict questions which asked:

> [d]id General Motors Corporation fail to act in good faith in performing any of the terms of the Dealer's Sales and Service Agreements with John Peterson Motors, Inc., such actions amounting to coercion, intimidation, or threats of coercion or intimidation" toward the plaintiffs?

changed significantly since that decision. In *Sharp*, however, the Supreme Court specifically acknowledged the continuing distinction between horizontal and vertical restraints, noting that:

> [r]estraints imposed by agreement between competitors have traditionally been denominated as horizontal restraints, and those imposed by agreement between firms at different levels of distribution as vertical restraints.

485 U.S. at 730. The Court stated that the conspiracy in *General Motors* was horizontal because it involved an anticompetitive agreement between dealers (competitors) in which General Motors joined, whereas the agreement in *Sharp* was vertical because it was between noncompetitors or entities at different levels of the distribution system. *Id.* at 734 & n.5 (also distinguishing *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647-50 (1980) (per curiam) and *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959) because they involved horizontal combinations); *but see id.* at 742-43, 747-48 (Stevens, J. dissenting) (arguing that the only distinction between *General Motors* and *Sharp* was that the former involved an agreement between three parties rather than two); *Sharp Dealing: The Horizontal/Vertical Dichotomy in Distributor Termination Cases*, 38 Emory L.J. 311, 332-33 (1989) (asserting that "despite its reference to 'demonstrable economic effects,' the Court in *Sharp* actually eschewed a substantive economic analysis of [Business Electronic's] termination in favor of formalistic line-drawing based on the number and relationship of the parties to the conspiracy"). The Supreme Court determined that the agreement in *Sharp* between a manufacturer and one of its dealers to terminate a price cutter constituted a vertical restraint to which the rule of reason should be applied absent "some agreement on price or price levels." 485 U.S. at 735-36.

The majority in *Sharp*, however, acknowledged

that, unlike vertical agreements, horizontal agreements need not set specific price or price levels in order to be per se illegal. 485 U.S. at 733-34. As one commentator observed:

> [i]n cases involving agreements among competitors, the [Supreme] Court has consistently held that even an indirect effect on prices is sufficient to invoke the per se rule. The majority in *Sharp* even acknowledged that fact, stating that horizontal agreements need not set specific price or price levels in order to be per se illegal.

Piraino, *Sharp Dealing*, 38 Emory L.J. at 330 (footnotes omitted).[16] The court further concludes that GM's misconstrues *Sharp* in its efforts to characterize this case as a vertical nonprice restraint because the statements in *Sharp* on which GM relies refer solely to the proper treatment of vertical restraints. 485 U.S. at 726-28.[17]

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[16] The commentator specifically relied on: *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980) (per curriam) (agreement among wholesalers to terminate their practice of extending credit); *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679 (1978) (involving an agreement among competitors to use specific methods of quoting prices which operated as a complete ban on competitive bidding); *United States v. Socony-Vacuum Oil Co*, 310 U.S. 150 (1940) (agreement among competitors to buy surplus gasoline in order to prevent prices from falling); *Sugar Inst. v. United States*, 297 U.S. 553 (1936) (agreement to adhere to previously announced prices in terms of sales).

[17] GM also argues that "today both horizontal and vertical agreements that directly and indirectly affect (but do not fix) prices are judged under the rules of reason." GM cites various cases to support its argument that even horizontal restraints are now judged by the rule of reason. *See, e.g., Broadcast Music v. Columbia Broadcasting Sys.*, 441 U.S. 1, 23-24 (1979). After *Broadcast Music*, however, the Supreme Court held that a similar agreement was illegal per se, concluding that "since price-fixing agreements... lack any 'redeeming virtue,' it is conclusively presumed [to be] illegal without further examination under the rule of reason." *Catalano,*

(continued...)

[17] (...continued)

Inc. v. Target Sales, Inc., 446 U.S. 643, 650 (1980) (per curiam).

Recent antitrust cases are difficult to reconcile. As one commentator observes:

> [t]he confusion among the cases has been aggravated by the Court's failure to develop a clear theoretical basis for its new approach. The Supreme Court decisions of the late 1970's and 1980's represent a broad philosophical turn in favor of the rights of defendants in antitrust caseas. However, each of these cases was decided on its own narrow facts. Few rules of general application emerge from the Court's case-by-case approach. Although in several situations the Court deemed it appropriate to eschew a traditional per se approach in favor of a consideration of the substantive competitive effects of defendants' actions, it never clearly defined which situations require a substantive competitive analysis. It is therefore difficult to distinguish the cases in which the Court has applied a [per se] approach from those in which it has engaged in a more detailed factual inquiry.

Piraino, *Reconciling the Per Se and Rule of Reason Approaches to Antitrust Analysis*, 64 S. Cal. L. Rev. 685, 705-06 (1991).

In analyzing the present cases, the court relied on *Sharp*, which explicitly rejects the notion that horizontal and vertical restraints are treated in the same manner:

> petitioner contends that since certain horizontal agreements have been held to constitute price fixing (and thus to be *per se* illegal) though they did not set prices or price levels, *see, e.g., Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647-50 (1980) (per curiam), it is improper to require that a vertical agreement set prices or price levels before it can suffer the same fate. This notion of equivalence between the scope of horizontal *per se* illegality and that of vertical *per se* illegality was explicity rejected in *GTE Sylvania, see* 433 U.S. at 57 n.27 — — as it had to be, since a horizontal agreement to divid territories is *per se* illegal, *see United States v. Topco Associates, Inc.*, 405 U.S. 596, 608 (1972), while *GTE Sylvania* held that a vertical agreement to do so is not.

485 U.S. at 733-34; *see also* Piraino, *Sharp Dealing*, 38 Emory L.J. at 330 (noting that "[i]n cases involving agreements among competitors, the [Supreme] Court has consistently held that even an indirect effect on prices is sufficient to invoke the per se rule" (footnote omitted)).

The present case involved no agreement about price or price levels. Following *Sharp*, the court thus had to determine whether the alleged conspiracy was horizontal or vertical in order or apply the correct antitrust standard.[18] *See id.* at 733-34. If the horizontal, per se rule would apply, but if vertical, the rule of reason would apply. *Id.*[19] In annalyzing whether a particular agreement is horizontal or vertical, the Supreme Court in *Sharp* noted that vertical action does not become horizontal action simply because its effects are horizontal because "all anticompetitive effects are by definition horizontal effects." *Id.* at 730 n.4. Thus "a restraint is horizontal not because it has horizontal effects, but because it is the product of a horizontal agreement." *Id.*[20]

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[18] On the facts of the present case, the key inquiry is not whether a price restraint is involved but rather whether the agreement is horizontal or vertical because *Sharp* affirms the fact that historically the per se rule has been applied to horizontal nonprice and price restraints. 485 U.S. at 734-35 (stating that the Court has applied the per se rule to: horizontal agreements that are deemed price fixing without setting prices or price levels, such as *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647-50 (1980) (per curriam); horizontal price fixing cases involving explicit agreements, including *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960); horizontal agreements to divide territories, such as *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 608 (1972) and horizontal boycotts of a price cutter, including *United States v. General Motor Corp.*, 384 U.S. 127, 140, 143-45 (1966)). The Court noted with approval that all of those cases applied the per se rule because they involved horizontal rather than vertical restraints.

[19] *But see* Pirainno, *Sharp Dealing: The Horizontal/Vertical Dichotomy in Distributor Termination Cases*, 38 Emory L.J. 311 (1989) (arguing that the Supreme Court should abandon the price/nonprice dichotomy and apply the per se rule when a manufacturer terminates a dealer as a result of pressure by its other dealers).

[20] In analyzing hybrid restraints, that is restraints with both horizontal and vertical components resulting from an agreement

(continued...)

After hearing all the evidence, the court determined that plaintiffs presented sufficient evidence so that a reasonable jury could find that a horizontal conspiracy existed and that GM knowingly joined the conspiracy. Following the framework of *Sharp*, the conspiracy was horizontal because it involved an agreement "among competitors", *id.* at 734 n.5 (discussing *General Motors*), and the per se rule was applied in accordance withthe *Sharp* Court's acknowledgement that horizontal agreements need not set specific price or price levels in order to be per se Illegal. *Id.* at 733-34; *see also* Piraino, *Sharp Dealing*, 38 Emory L.J. at 330. Moreover, the fact that GM became involved in the conspiracy renders the agreement no less horizontal or anticompetitive. *See, e.g., Sharp*, 485 U.S. at 734 n.5; *Arnold Pontiac GMC, Inc. v. General Motors Corp.*, 700 F. Supp. 838, 840-41 (W.D. Pa. 1988). The court thus instructed the jury using the per se standard.[21] The special verdict form

[20] (...continued)
between dealers and also an agreement between dealers and a manufacturer, the Supreme Court stated that "a facially vertical restraint imposed by a manufacturer only because it has been coerced by a 'horizontal carte[l]' agreement among ... distributors is in reality a horizontal restraint." *Id.* (citing R. Bork, *The Antitrust Paradox* 288 (1978)); *see also* Piraino, *Distributor Terminations Pursuant to Conspiracies Among a Supplier and Complaining Distributors: A Suggested Antitrust Analysis*, 67 Cornell L. Rev. 297, 298 (1982) (stating that "although the form of such a 'mixed termination' conspiracy may be vertical, the competitive purpose and effect of the conspiracy is more similar to horizontal conspiracies that exclude competitors of the conspirators from a market").

[21] Using the per se rule comports with the economic justification for the distinction between horizontal and vertical restraints. As one commentator stated.

> [w]hen a manufacturer is not acting for his own competitive purposes in terminating a distributor, but is merely acceding to the desires of one or more of his dealers that a competitor be terminated, it is appropriate to apply the per se rule. Such a termination amounts to naked restraint of trade

(continued...)

[21] (...continued)

> with no purpose except stifling competition. In such a case, the *Sylvania* rationale in favor of the rule of reason does not apply. Instead of acting to enhance his interbrand competitiveness, the manufacturer is merely aiding his distributors in a horizontal scheme to limit competition. The dealers initiating the restraint must enlist the manufacturer to participate in the conspiracy in order to effect the elimination of their competitor from the market. The manufacturer's participation lends a superficial vertical appearance to the termination, but the substantive competitive purpose and effect of the termination is horizontal because it has been instigated by the dealers.

Piraino *Sharp Dealing*, 38 Emory L.J. at 344-45 (footnotes omitted); *see also* 7 P. Areeda, *Antitrust Law* ¶ 1453c (1986), which states that:

> [a] restraint can be vertical in form without being the product of the manufacturer's free choice. He may adopt it in order to retain a particular dealer or group of dealers who demand such restraints on their competitors as a condition of continuing to deal with the manufacturer.
>
> If so, a court would be entirely correct to characterize the agreement that appears to be vertical in form as a restraint on 'horizontal competition.'

Id. (citation omitted).

Courts have recognized that "the coerced exclusion of discount rivals from the market place solely because of their pricing policies" impairs competition as much as price fixing agreements. *See, e.g., Burlington Coat Factory Warehouse v. Belk Bros. Co.*, 621 F. Supp. 224, 233 n.18 (S.D.N.Y. 1985). GM's actions also may have warned other dealers that the use of marketing programs like JPMI's would not be tolerated. For example:

> [u]nder *Monsanto*, such a signal could be evidence of the manufacturer's attempt to police a general resale price-fixing scheme. The verdict against Monsanto was upheld by the Court partially on the basis of a newsletter to distributors indicating that Monsanto would terminate distributors who did not comply with its policy on resale pricing.

Piraino, *Sharp Dealing*, 38 Emory L.J. at 330 n. 90 (citing *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 765-66 (1984)).

GM never terminated JPMI's dealership. The jury found, however, that GM restricted JPMI's allocation of vehicles. Plaintiffs

(continued...)

asked the jury first to determine if a conspiracy to substantially restrain prices existed between the dealers and the jury answered yes. The jury was asked to find if GM knowingly joined this conspiracy, and the jury found that GM had joined.[22]

In a similar situation, the United States District Court for the Western District of Pennsylvania also applied the analytical framework of horizontal and vertical conspiracies as set forth in *Sharp*. In *Arnold Pontiac GMC, Inc. v. General Motors Corp.*, 700 F. Supp. 838 (W.D. Pa. 1988), a case involving a Pontiac dealer, the court concluded that where an association of dealers reached an agreement to restrict the dealer's access to the market, that agreement was plainly horizontal, plainly anticompetitive and illegal per se even though GM joined the conspiracy and only GM had the power to effect the plan. *Id.* at 841-42. In the present case, plaintiffs proffered sufficient evidence for the jury to find that a conspiracy between dealers was designed to substantially restrain prices.[23] Plaintiffs

[21] (...continued)
contended that this restriction operated in much the same way as an outright dealer termination because the reduction forced JPMI to either abandon its marketing program, in which case plaintiffs presented evidence to show that it was unlikely that JPMI would be profitable because in the past when it had operated as a conventional dealer it lost money because its area of primary responsibility was too small and economically depressed to sustain a conventional dealer, or JPMI could choose to continue with its marketing program, and eventually go out of business because it would not be able to generate sufficient volume to turn a profit at the $49 over invoice prices.

[22] GM further argues that the jury questions so worded that it was impossible to produce answers that could support a finding of antitrust liability. The court rejectes this contention because the jury instructions followed the Supreme Court's analysis in *Sharp* regarding the distinctions between horizontal and vertical conspiracies and its explanation of why the *General Motors* case involved horizontal restraint.

[23] Plaintiffs introduced evidence that demonstrated that JPMI's (continued...)

also introduced evidence which indicated that the method GM used to substantially restrain price competition was a reduction of JPMI's allocation of automobiles.[24] The fact that General Motors became involved in the conspiracy to eliminate the $49 over marketing program by restricting JPMI's access to the market does not transform the arrangement into a vertical conspiracy, nor does it convert the nature of the conspiracy from one designed to substantially restrain prices into a nonprice restraint. *Id.* at 841. Because the conspiracy was essentially horizontal and substantially restrained prices, the per se rule is the appropriate standard. *See Sharp*, 485 U.S. at 730 n.4, 733-34; *General Motors*, 384 U.S. at 147 (citing *United States v.*

[23] (...continued)
marketing program operated to decrease automobile prices in the Twin Cities' area and that as a result, the other dealers became very concerned. Arthur Cobb, one of GM's experts, documented the effect that the $49 and over advertising had on the Twin Cities' market and conceded that the program had a downward impact on the price of new General Motor vehicles in the Twin Cities. (Defendant's Exhibit nos. 810-815).Jack Walser, president of the Twin City Buick Dealers' Advertising Association, complained to Pirtle about the fact that JPMI's advertising was forcing other dealers to decrease their prices. (Plaintiffs' Exhibit No. 211). Later, Walser threatened to resign from the Buick Dealers' Advertising Association because his "grosses" were being hurt by $200 to $300. (Plaintiffs' Exhibit No. 213). Mark Picker, district manager for Buick, further noted that JPMI's activities resulted in dealer complaints and had a negative impact on sales people and dealers as well as precipitating a decrease in sales at Twin City General Motors' dealers. (Plaintiffs' Exhibit No. 212). The Cadillac Dealers' Council organization also pressured General Motors to do something to stop "over invoice" pricing. (Plaintiffs' Exhibit No. 215).

[24] GM reduced JPMI's allocations to be "somewhat in line with planning potential". (Plaintiffs' Exhibit No. 511). Planning potential, however, was a factor never before used by General Motors for allocating vehicles and plaintiffs contend that the planning potential program was adopted in order to confine JPMI sales activities to its area of primary responsibility and minimize the effects of the 49 and over program on prices charged by other Twin City area dealers.

Parke, Davis & Co., 362 U.S. 29, 47 (1960); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940); and *Simpson v. Union Oil Co.*, 377 U.S. 13, 16-22 (1914)); *cf. Catalano*, 446 U.S. 643, 645-46 (1980) (applying the per se rule to a refusal to extend credit and reasoning that it constituted price fixing because it was "as plainly anticompetitive as an agreement to raise prices"). Thus, the court rejects GM's argument that the rule of reason was the correct stand.

3. General Motors' Objections Concerning Damages

General Motors also seeks to attack the damages awarded by the jury. Following the questions concerning the existence of the conspiracy, the special verdict form asked:

> Did the conspiracy, if any, cause injury to plaintiff John Peterson Motors, Inc.?
>
> What is the dollar amount which will adequately compensate John Peterson Motors, Inc. for its damage resulting from its injury, if any?

The jury found causation and awarded damages to JPMI of $986,000. GM now attacks the award on two grounds.

a. Causation

GM argues that it was not responsible for JPMI's failure as a dealer, rather JPMI's marketing strategy coupled with poor business judgment caused the failure.[25] GM, however, presented extensive evidence to

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[25] GM also argues that causation was not established because the jury found that GM complied with its contractual obligations. The jury, however, only found that GM's actions did not rise to the level of "coercion, intimidation, or threats of coercion or intimidation." This analysis is also flawed because the contract and antitrust claims are not parallel: GM could comply with the letter of its contractual obligations and still be guilty of using its allocation system for an improper antitrust purpose, for example, to fix or stabilize prices.

(continued...)

support its claim that JPMI's failure was caused by reasons other than GM's actions. The jury rejected the alternative explanations and found that JPMI's failure was caused by General Motors' actions in reducing the allocation of automobiles.[26]

b. Calculation

GM also attacks the amount of the jury award because it contends that plaintiffs failed to present any credible evidence on the issue of damages. It specifically attacks the projections of Douglas W. Helm ("Helm"), one of the plaintiffs' experts, and argues that because the calculations of plaintiffs' other experts, Lyman E. Ostlund and Ronald Carlson, were based on Helm's projections, that the testimony of all three witnesses was suspect. Once a plaintiff establishes an antitrust

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[25] (...continued)

General Motors further contends that earlier orders of the bankruptcy court are dispositive regarding the reason for JPMI's failure. *See In re John Peterson Motors, Inc.*, 47 Bankr. 551 (D. Minn. 1985). The court, however, determined that those bankruptcy orders did not conclusively establish the reason for JPMI's failure. First, the orders did not purport to determine the cause of the failure, although the bankruptcy court stated that either "fraud, dishonesty, incompetence or gross mismanagement" was involved. *Id.* at 552. The parties also did not have the opportunity to fully litigate the causation issue before the bankruptcy court. During trial, both sides presented extensive evidence and had a full opportunity to litigate the cause of JPMI's failure. GM presented extensive evidence regarding the various explanations that were listed by the bankruptcy court. The jury nonetheless determined that GM's actions were a substantial cause of JPMI's failure.

[26] Moreover, even if other causes contributed to JPMI's failure, damages attributable to GM's antitrust violation are recoverable even though factors other than the antitrust injury may have contributed to the damages. *Cf. Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.9 (1969) (analyzing damages under § 4 of the Clayton Act). A plaintiff is not required to exhaust all possible alternative sources of injury in order to recover damages; it is sufficient that the antitrust violation be a material cause of the injury. *Id.* Jury Inspection No. 22 adequately summarized this standard for the jury.

injury, however, the fact that its damages are difficult to ascertain will not preclude an award. The jury is permitted to make "a just and reasonable estimate ... based on relevant data [including] probable and inferential as well as direct positive proof." *See, e.g., Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264 (1967). All of plaintiffs' expert witnesses, including Helm, relied an actual data from the operation of JPMI's business as a basis for projecting and calculating lost profits. Such lost profits are properly recoverable in an antitrust action. *Reed Bros., Inc. v. Monsanto Co.*, 525 F.2d 486, 499 (8th Cir. 1975). The jury was properly instructed that the fact that JPMI was a new or unestablished business was not fatal to the element of damages. *See, e.g., T.V. Signal C. V. American Tel. & Tel.*, 617 F.2d 1302, 1308 (8th Cir. 1980) (citing *Heatransfer Corp. v. Volkswagenwerk, A.G.*, 553 F.2d 964, 988 n.20 (5th Cir. 1977)). Plaintiffs demonstrated that JPMI was profitable during the short period of time in which it was operated as a $49 and over dealer. Arthur Cobb ("Cobb"), an expert witness for GM, testified that a reasonable base period for the calculation of damages was the fiscal year beginning on July 1, 1983 and ending July 30, 1984, during which time JPMI actually engaged in its $49 and over marketing program. Cobb also conceded that if its allocations not been cut off, JPMI could have expected to sell 1,440 vehicles and to earn more than $100,000 in profits per year. The jury may have concluded that GM's calculation of losses was skewed by it included extraordinary losses resulting from JPMI's bankruptcy and legal expenses, losses which plaintiffs argued were caused by GM's illegal activities. GM's damage calculation also included periods of time when JPMI was not engaged in the $49 and over program and when it was in bankruptcy. The jury was free to disregard those periods in calculating damages.

Both sides presented extensive evidence on damages and the jury chose a dollar amount after listening to

that evidence. Plaintiffs provided sufficient evidence to provide damages that were neither speculative nor unreasonable and the instructions properly set forth the law regarding. Thus, defendant's objections to the amount of damages are rejected.

5. *General Motors' Motion for New Trial*

General Motors also raises various arguments to support its motion for new trial.

a. Evidentiary Matters

GM claims that various evidentiary rulings deprived it of a fair trial on the antitrust issues. GM first contends that, although the court issued a limiting instruction recognizing the inadmissibility of the Brook's letter (Plaintiffs' Exhibit No. 600) as proof of conspiracy, the letter was irrelevant and inadmissible for any reason. GM also argues that the prejudicial effect of the letter dictated that it should have been excluded under Federal Rule of Evidence 403. The Brooks's letter relates one customer's experience when trying to purchase a new car from JPMI in the Twin Cities' market during the time in which JPMI was engaged in the $49 and over program. It was written contemporaneously with the events surrounding the alleged conspiracy and Brooks sent the letter to GM to express his frustrations over the situation. It bears the hallmarks of the reliability because Brooks had no stake in the litigation and the letter reflects events that he observed at the time. Plaintiffs proffered it not as evidence of the existence of the conspiracy, but rather as evidence regarding GM's motive for reducing JPMI's allocation. GM contended that its actions were prompted in part by its concern for consumers. Plaintiffs argued that the letter demonstrated that GM was aware of one customer's dissatisfaction, yet it took no action to correct his problem. Because GM did not even reply to Brook's letter, plaintiffs argued that it was probable that GM's professed concern for the ultimate consumer as its reason for discouraging the $49 and over program may have been pretextual and that GM's

real concern involved the prices that Twin Cities' dealers could charge its customers. The court gave a limiting instruction that the letter was to be considered to establish GM's motives and in light of other evidence which demonstrated the existence of the conspiracy, its probative value outweighed its prejudicial effect.

GM also claims that testimony regarding another alleged conspiracy involving a former employee of JPMI, Terrence Dittrich, also prejudiced the trial. GM concedes, however, that the court instructed the jury to disregard any statements that plaintiffs attributed to Dittrich once the court ruled that Dittrich was not a co-conspirator for purposes of the antitrust claim. Any prejudice to GM was cured by the instruction given to the jury that Dittrich's actions were not attributable to the antitrust conspiracy.

GM further contends that after granting GMAC's motion for a directed verdict, the court improperly instructed the jury that GMAC's conduct could still be attributed to GM for purposes of determining liability under the antitrust laws. Plaintiffs presented substantial evidence that GMAC cut off credit in an attempt to force JPMI out of business. Although GMAC cannot be a co-conspirator with General Motors as a matter of law under *Copperweld Corp v. Independence Tube Corp.*, 467 U.S. 752 (1984), GMAC's actions may be attributed to GM, not as a co-conspirator, but as a wholly owned subsidiary acting with apparent authority as agent for GM. *See American Soc'y of Mechanical Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982) (imposing antitrust liability on principal as a result of agent's acts). Before final arguments, the court warned the jurors that GMAC could not be considered as a co-conspirator. The written jury instructions further warned that GMAC could not conspire with GM. In its final argument, GM also had the opportunity to comment on any of the evidence concerning GMAC and to emphasize that GMAC could not be a conspirator. According, the court rejects GM's claim that the jury

was improperly instructed concerning GMAC's role in the lawsuit.

b. Damages

GM contends that the special verdict form unnecessarily confused the jury and prejudiced GM because it required the jury to fill out a damage dollar amount regardless of whether GM was liable for any antitrust injury. During the charge conference, however, GM requested and the court inserted the phrase "if any" in the damage instruction to eliminate any prejudice to General Motors by the inclusion of the damages question. The court orally instructed the jury that the damage questions could be filled in with any amount, including zero.[27] Accordingly, the court determines that GM was not prejudiced by the questions requesting a dollar amount of damages in the special verdict form.

GM attempts to argue that the jury's verdict was perverse because Question 4 was filled in with a damage amount while Question 9, which asked for dollar damages, was filled with a zero. The jury verdict, however, was not perverse. In Question 3, the jury decided that GM's antitrust violation injured JPMI. In Question 4, the jury was asked to calculate the dollar amount of damages that were caused by GM's antitrust violation and it found those damages equalled $986,000. In question 9, the jury was asked to insert a dollar amount for damages which flowed from a violation of JPMI's sales and services agreements. Because the jury determined that GM did not violate the terms of those agreements in Question 7, it awarded no damages on that claim in Question 9. The verdict is therefore wholly consistent with the special verdict form and the instructions given by the court.

GM also contends that plaintiffs' experts were

[27] The court further notes that Minnesota federal courts commonly ask the jury to determine a dollar amount of damages resulting from a given event without regard to whether a defendant was liable for the event to minimize the risk of retrial after appeal.

improperly allowed to include prejudgment interest in their damage calculations. GM, however, consistently mischaracterizes the type of interest that the court permitted plaintiffs' experts to include in their calculations. The interest included was not prejudgment interest but rather an amount that reflected what JPMI's alleged lost profits would have earned if such funds had been invested and adjusted for inflation. The interest thus represented plaintiffs' experts estimate of the present value of plaintiffs' lost profits, not a statutory claim for prejudgment interest and as such, the amount was properly included in the damage calculations. *See, e.g., H.J., Inc. v. International Tel. & Tel. Corp.*, 867 F.2d 1531, 1549 (8th Cir. 1989) (determining that the proper measure of antitrust damages is the present value of lost profits); *Multiflex, Inc. v. Samuel Moore & Co.*, 709 F.2d 980, 996 (5th Cir. 1983) (permitting an expert to express a past damage figure in terms of present value for purposes of calculating antitrust damages and rejecting the argument that such calculations amounted to nothing more than prejudgment interest because the calculations were based on economic theory and not as a claim for statutory or common law prejudgment interest); *Heatransfer Corp. v. Volkswagenwerk, A.G.*, 553 F.2d 964, 987 n.20 (5th Cir. 1977) (affirming a net present value judgment to a claim for lost capital in a private antitrust suit). Therefore, plaintiffs' experts did not calculate prejudgment interest, they merely calculated the present value of losses sustained by JPMI. In doing so, they discounted the future earnings back to 1983 then calculated a damage amount in 1990 dollars. GM's assertion that the jury award included prejudgment interest is thus totally unfounded.

GM also attacks the jury award by arguing that damages should not have been calculated after 1985, because JPMI's dealer sales and service agreement would have expired in 1985 and its renewal was uncertain. GM's assertion that JPMI's agreement would

not have been renewed in 1985 is contrary to the evidence. Peterson testified that during all of his years in the automobile business such agreements were routinely renewed. Pirtle was also unable to identify any dealer whose agreement had not been renewed when it expired. Moreover, right up until the time that JPMI's supply of automobiles was reduced, Chevrolet, the assigned contract dealer, rated JPMI was satisfactory in all areas of its performance. The was also true of Buick. In fact, JPMI received an outstanding dealer award from Buick for maintaining high standards. (Plaintiffs' Exhibit No. 204). Thus there was sufficient evidence to permit the calculation of damages past the contract's expiration date in 1985.

CONCLUSION

There is evidence to support a jury finding of a dealer conspiracy and GM's participation in that conspiracy. There was evidence to exclude the possibility of General Motors' independent action and the evidence is sufficient to support a verdict under the per se standard as required by *Sharp*. There was also sufficient evidence to show that the conspiratorial activity caused injury to plaintiff and sufficient evidence through experts to demonstrate the amount of that damages. Thus, General Motors' motion for a judgment notwithstanding the verdict is denied.

Regarding the new trial issues, there has been no prejudice to General Motors. The curative jury instructions adequately eliminated such claims. The jury verdict is not perverse and claims that damages included prejudgment interest are erroneous. Therefore, defendant's motion for a new trial is denied.

Based on the foregoing, IT IS HEREBY ORDERED that:

1. General Motors' motion for judgment notwithstanding the verdict is denied as it relates to John Peterson Motors, Inc.;

2. General Motors' motion for judgment notwithstanding the verdict is granted as it relates to Donald John Peterson;

3. General Motors' motion for a new trial is denied; and

4. Plaintiffs' motion for costs and attorney's fees is denied without prejudice.

Dated: June 4, 1991

s/s David S. Doty

David S. Doty, Judge
United States District Court

United States Court of Appeals
For The Eighth Circuit

No. 91-2647MNMI

Thomas G. Lovett, etc., Appellee,	*
vs.	* Order Denying
General Motors Corporation, Appellant.	* Petition for Rehearing and Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. The petition for rehearing is also denied.

September 9, 1993

Ordered Entered at the Direction of the Court:

s/s Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

United States District Court
District of Minnesota
FOURTH DISTRICT

Thomas G. Lovett, Trustee of the Bankruptcy Estate of John Peterson Motors, Inc., and Donald John Peterson, individually,

Plaintiffs,

v.

General Motors Corporation, and General Motors Acceptance Corporation,

Defendants.

Civil No. 4-85-139

SPECIAL VERDICT FORM

We, the jury in the above entitled action, return the following answers to the questions presented to us.

1. Did General Motors Dealers, in an attempt to substantially restrain price competition, conspire to induce General Motors Corporation, or one of its divisions, to reduce the allocation of automobiles to John Peterson Motors?

   Yes X No _____

2. Did General Motors Corporation knowingly become a member of this conspiracy?

   Yes X No _____

3. Did the conspiracy, if any, cause injury to plaintiff John Peterson Motors, Inc.?

   Yes X No _____

Whether you answer questions 1, 2, and 3 "yes" or "no", please fill in a dollar amount for question 4.

4. What is the dollar amount which will adequately compensate John Peterson Motors, Inc. for its damage resulting from its injury, if any?

$ 986,000

4. Did the conspiracy, if any, cause injury to plaintiff Donald John Peterson?

Yes X No _____

5. Did the conspiracy, if any, cause injury to plaintiff Donald John Peterson?

Yes X No _____

Whether you answer questions 1, 2, 3, and 5 "yes" or "no", please fill in a dollar amount for question 6.

6. What is the dollar amount which will adequately compensate Donald John Peterson for his damage resulting from his injury, if any?

$ 266, 200

7. Did General Motors Corporation fail to act in good faith in performing any of the terms of the Dealer's Sales and Service Agreements with John Peterson Motors, Inc., such actions amounting to coercion, intimidation, or threats of coercion or intimidation towards plaintiff John Peterson Motors, Inc.?

Yes _____ No X

If your answer to question 7 "yes", then:

8. Did John Peterson Motors, Inc. sustain damages as a result of General Motors Corporation's acts or conduct referred to in question 7?

Yes _____ No X

Whether you answer questions 7 and 8 "yes" or "no", please fill in a dollar amount for question 9.

9. What dollar amount will adequately compensate John Peterson Motors, Inc. for its injury, if any?

$ 0

10. Did General Motors Corporation fail to act in good faith in performing any of the terms of the Dealer's Sales and Service Agreements with John Peterson Motors, Inc., such actions amounting to coercion, intimidation, or threats of coercion or intimidation towards plaintiff Donald John Peterson?

Yes _____ No X

If your answer to question 10 "yes", then:

11. Did Donald John Peterson sustain damages as a result of General Motors Corporation's acts or conduct referred to in question 10?

Yes _____ No X

Whether you answer questions 10 and 11 "yes" or "no", please fill in a dollar amount for question 12.

12. What dollar amount will adequately compensate plaintiff Donald John Peterson for his injury, if any?

$ 0

Dated: December 14, 1990

s/s Barbara Sucherman
(Foreperson)